Supreme Court, U. S.
FILED
MAY 17 1977
MICHAEL CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Number 76-1609

STATE OF INDIANA,
Petitioner,

- vs -

SCOTTSDALE MALL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Assistant Attorney General

219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-4725

Central Publishing Company, Inc., Indianapolis, Ind. 46204

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction of this Court	2
Question Presented for Review	2
Statutes Involved	2
Statement of the Case	3
Argument	6
Conclusion	14

Appendix A

Opinion of the Court of Appeals of February 16, 1977	A-1
Judgment of the Court of Appeals of February 16, 1977	A-13

Appendix B

District Court Judgment Entry of April 2, 1976	A-15
District Court Memorandum Opinion of April 2, 1976	A-17
District Court Amended Judgment Entry of May 3, 1976	A-32
District Court Supplemental Memorandum of May 3, 1976	A-34

	Page
Appendix C	
42 U.S.C. § 4332	A-36
23 U.S.C. § 103	A-39
23 U.S.C. § 105	A-45
23 U.S.C. § 106	A-46
23 U.S.C. § 109	A-46
23 U.S.C. § 110	A-49
23 U.S.C. § 120	A-49
23 U.S.C. § 145	A-50

TABLE OF AUTHORITIES

Cases	Page
Aberdeen and Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975)	7
Flint Ridge Development Co. v. Scenic Rivers of Oklahoma, —— U.S. ——, 96 S.Ct. 2430 (1976)	7
Kleppe v. Sierra Club, —— U.S. ——, 96 S.Ct. 2718 (1976)	7
Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2 Cir. 1972)	13
Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5 Cir. 1973)	13
National League of Cities v. Usery, —— U.S. ——, 96 S.Ct. 2465 (1976)	6
Statutes and Regulations	
23 U.S.C. § 103	8
23 U.S.C. § 106	12
23 U.S.C. § 109	11
23 U.S.C. § 145	11
28 U.S.C. § 1254	2
42 U.S.C. § 4332	3, 6, 10, 12
23 C.F.R. § 771.5(e)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Number ———

STATE OF INDIANA,
Petitioner,

- vs -

SCOTTSDALE MALL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, State of Indiana, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 16th day of February, 1977.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy thereof is attached hereto as AppendixA.

The prior opinion of the United States District Court for the Southern District of Indiana is reported at 418 F. Supp. 296 and is also attached hereto as Appendix B.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was issued and entered on February 16, 1977. No Petition for Rehearing was filed with the Court of Appeals.

The basis for jurisdiction of this Court is found in 28 U.S.C. § 1254.

QUESTION PRESENTED FOR REVIEW

Whether a State which had initially programmed a highway construction program for federal financial aid as part of the Federal-aid primary system but had withdrawn the request for federal funding and refunded any money received, all prior to the taking of any action significantly affecting the quality of the human environment, must meet the requirement of the preparation of an environmental impact statement satisfying all requirements of federal statute and regulations.

STATUTES INVOLVED

The statutes required to be considered in this matter are many and lengthy, involving both the requirement of an environmental impact statement for major federal actions and also the nature of the Federal-aid system of highway construction. Those statutes are therefore set forth as Appendix C hereto. The statutes included are 42 U.S.C. § 4332 and 23 U.S.C. §§ 103, 105, 106, 109, 110, 120 and 145 in relevant parts.

STATEMENT OF THE CASE

More than twenty years ago the State of Indiana initiated a study leading to the construction of a limited access highway bypassing the South Bend-Elkhart metropolitan area in northern Indiana. Such highway would go south of the urban area from a point on Highway U.S. 20 west of South Bend to a point on Highway U.S. 20 east of Elkhart. The first portion, from the western terminus of the proposed bypass to Highway U.S. 31 south of South Bend (the West Leg), was constructed with federal assistance and was completed in 1967. The remainder of the project (the East Leg) was divided into three projects for administrative purposes. The first extended from U.S. 31 to State Road 331. The location of that segment and the other two segments was determined in 1967.

In 1968, respondent Scottsdale Mall, an Ohio limited partnership, bought property within the planned highway corridor and constructed a shopping center in such a manner that construction of the highway as planned would eliminate 599 parking spaces from the shopping center and prevent expansion of the shopping center. Scottsdale Mall knew of the highway location plans at the time it acquired the property.

In 1970, the federal environmental protection statutes took effect. One provision, 42 U.S.C. § 4332, requires all agencies of the federal government to prepare an environmental impact statement (EIS) as to any major federal action significantly affecting the quality of the human environment.

Thereafter, the State withdrew its request for federal participation in the first segment but continued to program

money to other projects which had been eligible for federal funding but for which there had not been federal money available.

The District Court later dissolved the preliminary injunction and entered judgment for the State. Scottsdale Mall appealed to the United States Court of Appeals for the Seventh Circuit, which on February 16, 1977, vacated the judgment of the District Court and remanded the action, ruling that an EIS would be required.

the remaining two segments for federal funding. As part of such programming, the State prepared an EIS as to those two segments. The federal government later changed its requirements, indicated that State Road 331 was not a natural terminus for the project and demanded a supplemental EIS for the first segment of the East Leg, which segment was proceeding without federal participation. That supplemental EIS was approved by the Council on Environmental Quality, but was later found by the District Court to have been procedurally faulty in that it was not circulated to the public for comment.

When the State began land acquisition for the first segment.[1] (the remaining segments not being advanced to that stage,) Scottsdale Mall sued the State[2] and the federal government, pursuant to 28 U.S.C. §§ 1331 and 1332, to enjoin further action as to any part of the East Leg because of the improper EIS. On January 20, 1975, the District Court entered a preliminary injunction as requested by Scottsdale Mall. The federal government then withdrew its approval of the EIS and was thereupon dismissed from the action. Preparation of a new EIS at that point would have delayed the project for at least a year. Thereafter, the State withdrew the request for federal funding of any part of the East Leg and made an accounting transfer of $162,000.00 in federal funds received for preliminary engineering studies as to the East Leg and applied such

---

[1] The record shows such acquisition to have involved only State funding. Statements in the opinion of the Court of Appeals that federal funds were used for land acquisition for the East Leg are erroneous.

[2] Named defendants below included the State as an entity and also the Indiana State Highway Commission and its members. All of such parties are considered to be included within the designation "State of Indiana" for purposes of this Petition.

ARGUMENT

This case presents important questions of statutory construction and federalism in regard to the nature of the program of federal aid for state highway construction and to the relationship between that system and the National Environmental Protection Act. This Court has not yet considered these questions, which are of vital interest to the State of Indiana and to the other states.

The requirement of environmental law relevant here is the requirement that, as to any major federal action significantly affecting the quality of the human environment, the federal agency involved must prepare an involved statement of the effect of such action on the environment and of alternatives available. 42 U.S.C. § 4332. It is emphasized that the terms of this statute place certain limits on its applicability. It applies only to the federal government and not directly to the states. Any attempt to make it totally applicable to the states and to state action would raise very serious constitutional questions as to our federal system of government. See *National League of Cities v. Usery*, —— U.S. ——, 96 S. Ct. 2465 (1976).

It is in the nature of our system of cooperative federalism that state governments will be deeply involved in many federal programs, in which it will be more reasonable for the state officials involved to be the ones to do the actual preparation of the EIS. Such involvement, however, does not affect the basic requirement that the EIS is that of the federal agency. Indeed, the statute was amended in 1975 to expressly recognize that ongoing practice, but emphasized that the federal agency retained the full responsibility. 42 U.S.C. § 4332(d).

Major federal actions to which the EIS requirement applies will frequently involve interaction with states or private parties in a number of contexts. In the federal-state areas, many such interactions will involve federal financing of state action. In other areas of major federal action, the nature of the interaction may include control over the rates which private rail carriers may charge their customers, *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975), or leases for mineral development on federal lands, *Kleppe v. Sierra Club*, —— U.S. ——, 96 S.Ct. 2718 (1976). One major federal action to which the EIS requirement has been held for other reasons not to apply is the approval of a statement of record and property report required for interstate land sales. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, —— U.S. ——, 96 S.Ct. 2430 (1976). The nature of the interactions vary in that in some of the above situations the involvement of the federal government is indispensible. Rates charged by railroads in interstate commerce must be approved by the Interstate Commerce Commission; the federal government as landowner must consent to any lease of its property. But in other cases, the involvement of the federal government is not indispensible to the same degree. In the *Flint Ridge* case, for example, federal approval was required only if sales were to be made across state lines. It was noted "that even absent federal approval the project could go ahead so long as the lots were not sold in interstate commerce." 96 S.Ct. at 2436, fn. 7.

It is the first contention of the State of Indiana that there is no indispensible federal involvement in the construction of primary highways. Not all highways need be constructed with federal aid. Indeed, many highway construction projects are completed by the State of Indiana without federal assistance. It is submitted that as regards

the Federal-aid primary highway system, the major federal action is *not* the *construction* of the highway, but the *financing* of the highway in part with federal funds.

The nature of the Federal-aid primary system is set forth in 23 U.S.C. § 103(b), which is included in Appendix C hereto. In 1921, the primary highway system may have involved a discrete system of highways as to which there was a significant federal interest. But the constant expansion of that system through the years, as provided for in that statute, has created a system which has since been recognized by amendment of the statute as such main roads as may be designated by the State. 23 U.S.C. § 103(b)(2). By way of contrast, the Interstate system involves a more direct federal interest.

> "It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities and industrial centers, to serve the national defense . . ." 23 U.S.C. § 103(e)(1).

That not all federally financed highway construction involves an immediate vital federal interest is shown by the Federal-aid secondary system, which may include such items of purely local interest as rural mail routes and public school bus routes. 23 U.S.C. § 103(c)(1).

Litigation of this case in the District Court involved two stages. At the time of the first stage, involving a preliminary injunction, construction of a part of the remaining sections of the bypass was programmed for federal financial support. (The portion involving Scottsdale Mall had already been withdrawn from federal participation, but had been considered in a supplement to the EIS covering other portions because of requirements that the EIS consider all sections of the highway, whether included in the specific project or not, within logical termini.) At that

point, the District Court found a procedural error in the EIS. As to substance, the EIS had been approved under the standards in effect at the time of its submission.[3] It would, however, be necessary to begin afresh on a totally new EIS, a process which would take at least a year.

The alternatives facing the State of Indiana at that point were either to delay the needed projects for at least a year while maintaining the option of using federal funds for construction, assuming that there would be federal funds not otherwise needed at the future time,[4] or to withdraw from the federal program and proceed immediately with solely state funds. The State of Indiana understandably chose the second option. It should be emphasized that the State's motive was not to ignore environmental concerns or to accomplish results that would be harmful to the environment. There was no reason to believe that a new EIS would not be approved. The motive, rather, was to avoid further delay.

The State of Indiana contends that this option was properly open to them for the reasons above stated that the EIS requirement does not apply to the State of Indiana as such and that the only significant interest of the federal government in the projects is the use of federal funding. The only proper remedy, therefore, is the denial of federal

---

[3] A major underlying problem in this case has been that the guidelines concerning the EIS were in a state of constant flux during the period that the State of Indiana was preparing plans for the East Leg of the bypass. As soon as the State was in a position to fulfill the requirements, those requirements were changed.

[4] During this period, there were ordinarily more state funds available than federal funds, so that some projects would be expected to proceed with solely state financing in any event.

funding and the refund (either directly or by transfer of the federal funds to a different project) of federal monies already donated. Indeed, as noted by the District Court, (p. A-26) the State's noncompliance with federal law by not providing a proper EIS has already precluded federal funding. 23 C.F.R. § 771.5(e).

It is noted at this point that the Court of Appeals has ruled that an EIS is required before work on the bypass can continue. But the State of Indiana has no authority to prepare or submit an EIS. The statute, 42 U.S.C. § 4332, specifically provides that the EIS is the responsibility of the *federal* agency. Even if a state agency in fact does the work of preparation, the EIS is that of the federal Department of Transportation. But D.O.T. has accepted the withdrawal of the request for funding and probably would deny funding at this time in any event. Thus, D.O.T. has no interest in the bypass project which would cause it to present an EIS for consideration and approval. Further, D.O.T. was dismissed from this litigation at an earlier stage of the proceeding, and so it is not within the jurisdiction of the District Court to order the D.O.T. to take any action.[5] Thus, the Court of Appeals has created an impossible situation.

The position of the State of Indiana would appear to be strengthened by an express recognition by Congress in 1973 that:

[5] It would seem from the ruling of the Court of Appeals that the State of Indiana would also be required to accept federal funds for the bypass and that the federal government would therefore presumably be required to provide those federal funds. The alternative is a holding that the procedural error of not circulating the EIS forever precludes that State of Indiana from constructing a bypass around the South Bend-Elkhart metropolitan area.

> "The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program." 23 U.S.C. § 145.

That provision, it should be noted, was enacted later in time than the National Environmental Protection Act or the provisions of 23 U.S.C. § 109 dealing with environmental effects as a required consideration in the federal assistance highway program. Section 145 makes it quite clear that the construction projects are state activity while the federal involvement is that of assistance in funding.

It is thus the first contention of the State of Indiana that the highway itself can never become a major federal project, but that only the funds received as federal assistance are the federal involvement, so that the only proper relief in the event of a violation of the EIS requirements is an injunction against federal funding of the project. In the alternative, the second contention of the State of Indiana is that, if the construction of a highway can ever become itself a major federal project, it does not do so until a point which was not reached in this case in any segment of the East Leg while that segment was programmed for federal assistance.

There are 238 steps to be taken on a highway project before it is complete. Not all of these steps are of equal significance, however; most involve preliminary planning and engineering stages. These involve such things as general location studies, final location determination, design stage and preliminary engineering. The State of Indiana

submits that the actions which would make a project a major federal action for purposes of environmental law are those actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332. That statutory language would appear to set the line at which the act is necessarily applicable as being at the stage where the actions have an actual effect. That point would be, in a highway project, when land acquisition begins, resulting in the dislocation of persons from homes and businesses and resultant demolition of structures. The primary stage having effect on the environment is, of course, the construction itself. It might also be noted that these few stages near the end of the total process also account for the vast bulk of the cost of the project. While it is necessary, in order to avoid unnecessary waste, to have the environmental studies made as early in the total process as possible, the time the planning is done is not the same as the time crucial to the purposes of the act. Any waste of time and blueprint paper caused by erroneous design and engineering would not reasonably be considered to be a major action significantly affecting the quality of the human environment.

In terms of the Federal-aid highway programs, the crucial point is that the approval by the federal government of "plans, specifications and estimates" (P,S&E). This stage, which follows the preliminary engineering but precedes land acquisition, is the point at which there arises "a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a).

That point was held by the District Court to be the point at which a highway project becomes a major federal project as to which a state is bound by the requirements

of the National Environmental Protection Act. That same result has been reached by other United States Courts of Appeals. *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2 Cir. 1972); *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5 Cir. 1973). While the Court of Appeals in this case declined to specifically hold at what point a project becomes irrevocably federal, it would appear to support the view that such result is reached at the location stage. If there is any holding of the Court of Appeals in this case, such holding creates a conflict among the circuits which this Court should resolve.

Until the time of P,S&E, any programming of a project for possible federal participation merely creates in the State an *option* to proceed with federal funding if further requirements are fulfilled, if P,S&E approval is granted, and if federal funds are available. Federal requirements may be changed from time to time. Even if those changes in requirement do not mean changes in the highway location or design, they certainly may create delay which would necessitate balancing the desirability of federal money against the urgency of the need for the particular project. The future availability of federal money may also be questionable. During the period in question here the State of Indiana had more state money available than federal money for construction projects, so that a number of projects were done without federal participation. It is again noted that a highway project is not a short-term project; the bypass project involved in this case has been in process for more than twenty years. The requirement of an irrevocable determination as to federal participation years before construction can be expected to begin would place an unreasonable burden on the states. Nor can environmental considerations be a justification for requiring such a burdensome choice when that choice would be

made years before there could be any major federal action significantly affecting the quality of the environment. Until land acquisition[6] and construction are ready to proceed, any action is *de minimus* rather than major, is state rather than federal, and does not significantly affect the quality of the human environment.

CONCLUSION

For the foregoing reasons, petitioner, State of Indiana, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 16th day of February, 1977.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Assistant Attorney General

Attorneys for Petitioner

---

[6] As noted several times above, the only land acquisition as to the East Leg of the bypass involved the first segment after that segment had been withdrawn from consideration for federal funding. Such land acquisition was with state money only. As specifically found by the District Court, the only federal money involved was for preliminary engineering.

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 76-1632

SCOTTSDALE MALL,

Plaintiff-Appellant

v.

STATE OF INDIANA, INDIANA STATE HIGHWAY COMMISSION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP-74-688-C—**James E. Noland,** *Judge.*

Argued December 9, 1976—Decided February 16, 1977

Before PELL and BAUER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Defendants-Appellees State of Indiana and The Indiana State Highway Commission withdrew a state highway project from a

---

* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

federal-aid highway program (23 U.S.C. § 101 *et seq.*), and claim a right to proceed with state funds in the final stages and construction of the project. By electing to withdraw the project from federal funding consideration, defendants have avoided compliance with the environmental impact statement requirements which are made necessary for major federal actions" by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* We are called upon to determine whether the project in this case is a "major federal action," and whether the state may avoid the requirements of NEPA by withdrawing the project from federal programming.

Plaintiff, an Ohio partnership, owns a shopping center through which defendants were about to construct a highway. The district court granted a preliminary injunction against defendants on the ground that there had been no compliance with federal environmental statutes. Following a trial on the merits, the district court dissolved the preliminary injunction and entered judgment in favor of defendants. We vacate that judgment and remand.

The facts are not in dispute. The project which is the focal point of the controversy in this case is a proposed development of a 28-mile-long by-pass around the South Bend-Elkhart metropolitan area in Northern Indiana. As the result of a study initiated more than twenty years ago by defendant Highway Commission, a four-lane limited access highway was conceived to alleviate traffic congestion along Highway U.S. 20, which runs generally in an east-west direction through the center of the South Bend-Elkhart metropolitan area. The western terminus of the by-pass exists at a point on U.S. 20 west of South Bend; the eastern terminus is to be located at a point east of the City of Elkhart.

The by-pass project was programmed to be constructed as a federal project in four segments. One segment, from the western terminus on U.S. 20 to a point on U.S. 31 south of the City of South Bend, already has been constructed with an expenditure of approximately 6.7 million dollars in federal funds. This segment appears to occupy roughly one-fourth of the total mileage of the project. The remainder of the project, approximately 20 miles in length, was planned to be constructed as a federally funded program in three segments since 1966 or 1967. The First Segment was planned to run due east from the eastern terminus of the segment which had already been constructed to a point on State Road 331, a distance of 3.8 miles. It is the construction of this First Segment which gives rise to the controversy in this case.

In 1968 plaintiff purchased the site of the present Scottsdale Mall, a shopping center complex in South Bend. The district court found that, as presently planned, the 3.8 mile First Segment of the by-pass would bisect plaintiff's property, which is located near the western terminus of the proposed First Segment. Construction of the segment would permanently remove 599 parking spaces from the center, and would render inoperative the expansion potential which is part of the inherent design of the shopping center. As the district court further found, the location for the corridor of the First Segment as well as the remaining segments was established in 1967 after considerable discussion regarding the general location of the proposed by-pass. At the time of acquiring the site of the shopping

center, plaintiff knew that the by-pass corridor would bisect its property.[1]

On December 5, 1974, the Highway Commission advised the plaintiff that it intended to proceed with the First Segment as originally proposed. As of that date, substantial steps had been taken under the Federal-Aid Highway Act to construct the remaining segments with the assistance of federal funds. Plaintiff then instituted this action, seeking to enjoin the State of Indiana and its Highway Commission from proceeding with the plans to construct the First Segment on the grounds that the selection of the route as proposed by the State of Indiana was arbitrary and capricious, and that the State had not filed an Environmental Impact Statement (EIS) as required by federal law. The district court granted the preliminary injunction on January 20, 1975. The defendants then decided to construct the First Segment and remaining segments without federal assistance and took steps to "de-program" this project from further federal consideration.[2]

---

[1] In 1972, plaintiff acquired a 20-acre parcel of land adjacent to the shopping center for purposes of expanding the facility. On June 11, 1974, plaintiff offered to transfer this parcel with appropriate waivers to defendants if defendants would agree to relocate the center line of the First Segment on the 20-acre tract. Plaintiff asserted that the acquisition costs of its property under the original design of the First Segment would be $22.4 million, while use of the 20-acre tract would result in a gift to the defendants of land valued by plaintiff at $600,000. Defendants rejected this offer. One of the grounds urged for the injunction below was that the defendant Highway Commission acted arbitrarily and capriciously in refusing plaintiff's offer. The district court found otherwise. No issue is raised in this appeal with respect to that finding.

[2] As a result of this decision, the U.S. Department of Transportation and its Secretary, originally named as defendants, were dismissed.

Our review of the record reveals a project with an extensive history of federal-state involvement. Since as early as 1966, the three remaining segments of the by-pass were scheduled, programmed, and worked upon as a federal project. The project went through the programming stage in accordance with 23 U.S.C. § 105 and regulations promulgated thereunder. Location hearings were conducted as required by federal law. In accordance with the Federal Highway Administration's Policy and Procedure Memorandum 20-8 of 1969, the Highway Commission published a notice indicating that the Department of Transportation had approved the design plans for the First Segment. Between August, 1971, and February, 1975, defendants received $162,000. in federal money for purposes of completing preliminary engineering studies of the project.[3] The record shows that the preliminary engineering stage was virtually completed, and that the state was about to commence right of way acquisition with federal funds when the plaintiff instituted this action.

In 1973, the Highway Commission requested authority to proceed with land acquisition for the First Segment. When the federal authorities advised that an EIS was required, the Highway Commission advised the Department of Transportation that it intended to withdraw its application for federal funding of the First Segment. The Department of Transportation then informed the Highway Commission that all three remaining segments were, for EIS purposes, considered one project, and that, even though the state had withdrawn its application for federal funds as to the First Segment, an EIS would be required

---

[3] On oral argument, counsel for plaintiff indicated that the total amount spent was $265,000.00. Counsel for defendants asserted a figure of $162,000. The district court found that $162,000.00 had been received by defendants. Our review of the record supports the finding of the district court.

for all remaining segments of the by-pass. Indiana's compliance with this requirement and the Department of Transportation's actions with respect thereto are less than exemplary. The State submitted a final EIS for approval to the Secretary of the Department of Transportation for the remaining two segments. The State then supplemented that EIS with an EIS as to the First Segment. Although the supplement was procedurally[4] and may have been substantively deficient, the Secretary approved the submission. When plaintiff questioned the adequacy of the EIS, the Secretary, in January, 1975, responded by withdrawing its approval of the EIS and requiring another single EIS to be prepared for all three remaining segments of the by-pass.

In early 1975, approximately 185 million dollars were made available to finance Indiana highway projects. All of these funds had to be committed to specific projects by July 1, 1975. By that date, Indiana had committed all of the federal funds to projects other than the by-pass, and shortly thereafter took steps to "de-program" the remaining two segments of the by-pass from federal funding consideration. The State indicated on brief and during oral argument that the federal monies previously received for preliminary engineering study were "refunded" to the federal government. We note that the net amount of funds received by Indiana was not reduced by the "refund". In fact, the record indicates that Indiana made an account-

[4] The EIS as to the First Segment was never circulated to the public for comment as required by 42 U.S.C. § 4332 (C) and 23 CFR § 771.12(c).

ing transfer of the money, apply the amounts received for the by-pass to other projects.[5]

The district court concluded that since the Highway Commission had failed to obtain an EIS at the location stage as required by 23 CFR § 771.5 (b),[6] its eligibility for federal funding was foreclosed—a course of action reserved to each state by right under 23 U. S. C. § 145. That statute provides:

> The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the State to determine which projects shall

[5] Such accounting transfer of federal funds from one state project to another under the guise of "refund" have been viewed with disfavor. See: *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974); *Named Ind. Mem. of San Antonio Con. Soc. v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971).

[6] 23 C. F. R. § 771.5 (b) provides: "In the development of the highway section, . . . the EIS . . . shall be completed during the location stage, prior to the selection of a particular location; except for those highway sections to which this part applies that had received location approval prior to the effective date of this part." Although location approval of the bypass preceded the effective date of this regulation, and thus the project apparently falls within the exception, we interpret the district court's finding to mean that since no EIS was completed as required, the project was not eligible for federal funds. The exception does not mean that no EIS is required if the project had progressed beyond the location stage prior to the effective date of the regulation. 40 C. F. R. § 1500.13 requires the preparation of an EIS for major federal actions initiated prior to the effective date of NEPA (January 1, 1970). Furthermore, an EIS must be prepared for those highway projects for which Plans, Specifications, and Estimates Approval (P,S&E Approval) had not been given by the Secretary prior to January 1, 1970. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 699 (1972). See also *San Antonio, supra*, 446 F.2d at 1025. In this case we are advised that Indiana's next step in seeking federal funding for the by-pass was to acquire P,S&E Approval from the Secretary.

be federally financed. The provisions of this chapter provide for a federally assisted State program.

We do not view 23 U. S. C. § 145 as granting to a state the prerogative to avoid compliance with NEPA. Rather, in view of the cogent policy statements of Congress with respect to environmental considerations as expressed in NEPA, we see § 145 as a general recognition by Congress of each state's sovereign right to choose which of its many transportation construction projects shall be programmed for Federal-Aid Highway Act (FHWA) assistance. As the last sentence of the quoted statute points out, FHWA provides for a federal assisted state program, and the fact that federal funds are authorized by Congress through appropriation or the fact that those funds are made available for expenditure does not infringe on the right of a state to select a project to be financed solely out of its own funds. Section 145, however, does not give the state the right to avoid the requirements of NEPA.

The legislative history of FHWA of 1973 is tortured, reflecting considerable controversy in Congress on the issue of whether Highway Trust Fund Appropriations should be used for further construction of highways, or should be used to construct public transportation facilities. A compromise was reached in conference between both Houses. It appears to us that enactment of the FHWA of 1973, and specifically Section 123 (a) thereof (23 U.S.C. § 145), was a reaffirmance by Congress of the cooperative federal-state character of projects programmed and undertaken pursuant to the Act [see: 119 *Cong. Rec.* 28099-28100 (1973) (remarks of Congressman Anderson)]. We do not interpret 23 U. S. C. § 145 as statutory authority whereby a state may take substantial steps over a period of years to program a project for federal assistance, and then withdraw the program from federal funding consideration with a resulting avoidance of complying with federal environmental statutes.

The point at which a state highway project becomes a major federal action for purposes of NEPA has been considered by other courts. Some courts have indicated that the EIS requirements for NEPA become applicable to a federally funded highway project at least at the stage of location approval. *Indiana Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Morningside-Lenox Park Association v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971); *LaRaza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971); *aff'd.* 488 F.2d 559 (9th Cir. 1973).[7] In *Named Individual Members of the San Antonio Conversation Society v. Texas Highway Dept.*, 446 F.2d 1013, 1027 (5th Cir. 1971), the court found that a state highway project became a federal highway project when the Secretary of Transportation authorized federal participation in the project.

In determining that Indiana had properly withdrawn the by-pass project from federal funding such that the project no longer could be considered a "major federal action" requiring an EIS, the district court noted: "[Highway Commission's] decision not to comply with the eligibility procedures necessary to maintain [its] option to receive federal highway funds cannot have the paradoxical effect

---

[7] Although the *LaRaza* cases, *supra*, held that a state highway project became a federal-aid project on the date it received location approval for purposes of the applicability of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. Sections 4622-4655, and did not consider the applicability of NEPA [see: *City of Highland Park v. Train*, 519 F.2d 681, 695 (7th Cir. 1975)], we nevertheless find the policy considerations underlying the application of the Relocation Act to a state highway project which seeks federal funding assistance to be similar to the policies underlying the application of NEPA to such projects.

of producing federal involvement." In this regard, the district court found that federal participation in the by-pass project was limited to the initial programming stage. We think the district court erred in this finding. Our review of the record indicates federal participation in the programming, location, design, preliminary engineering, and right of way acquisition stages. Hence, we have no difficulty in concluding on the basis of the record before us that the entire by-pass project is a "major federal action" within the meaning of 42 U. S. C. § 4332 (C) and that an EIS is required for the remaining three segments.

Inasmuch as the State of Indiana contends that under the circumstances of this case it may withdraw the project from federal funding participation, we are squarely faced with the troublesome question of whether by doing so at this late stage of the project, it is also relieved of its obligation to comply with NEPA. We are guided in this regard by the strong admonition of Congress contained in NEPA:

> "The Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA] . . .". 42 U. S. C. § 4332.

Given this expression of Congressional will, we are convinced that there is a point in the on-going federal-state relationship under Federal-Aid Highway Act programming at which the requirements of NEPA must be met. Under the facts and circumstances of this case, Indiana's seeking and receiving federal approval at various stages of the project and receiving preliminary financial benefits so imbued the highway project with a federal character that, notwithstanding the state's with-

drawal of the project from federal funding consideration, compliance with federal environmental statutes was necessary. Were we to hold otherwise, we would give little, if any, effect to the Congressional directive so cogently expressed by the phrase "to the fullest extent possible."

In the instant case, the record shows federal involvement up to and including right of way acquisition. The precise point at which a federally programmed state highway project becomes irrevocably federal in character for NEPA purposes is a decision we deem unnecessary to make since, for purposes of this case, we find the by-pass project sufficiently federal in character to require compliance with NEPA. We do not consider Indiana's act of withdrawal a crucial fact in the determination of whether or not the provisions of NEPA are applicable to the project in this case. Rather, we look to the history of federal-state involvement to determine if the project is a "major federal action" requiring NEPA compliance.

The State of Indiana has urged that preliminary federal-state dealings and its compliance with applicable federal statutes and regulations only present a possibility of federal funding, and by complying with federal requirements and receiving federal approval at various stages, the state preserves its option to seek federal funds for a project. Further, Indiana contends that a project becomes irrevocably federal in nature at the time of PS&E approval. We reject these contentions. If Indiana had not long ago sought federal funding for the by-pass project, had not programmed the project for federal assistance, sought and received federal approval of the location and design stages, received federal funds for preliminary engineering studies, and had not begun right-of-way acquisition, but rather had proceeded with these various phases of the project on its

own, the result in this case might have been different. See *Citizens For Balanced Environ. & Transp., Inc. v. Volpe*, 376 F. Supp. 806 (D.Conn. 1974), *aff'd. per curiam*, 503 F.2d 601 (2nd Cir. 1974).

Plaintiff also contends that if we do not find NEPA applicable to this case, the district court erred in refusing to decide the issue of whether the defendants had complied with Indiana environmental laws. (*Ind. Code* 13-1-10-1 *et seq.*). In light of our decision above, we need not address ourselves to this issue.

Accordingly, the judgment of the district court is vacated and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Campbell*

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
February 16, 1977

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

SCOTTSDALE MALL, *Plaintiff-Appellant,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division No. IP 74-688-C
No. 76-1632 vs.	)	
STATE OF INDIANA, INDIANA STATE HIGHWAY COMMISSION, et al., *Defendants-Appellees.*	)	JAMES E. NOLAND, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED, with costs, and the cause REMANDED, in accordance with the opinion of this court filed this date.

* Honorable William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
	)	
Plaintiff,	)	
vs.	)	**CAUSE NO. IP 74-688-C**
	)	
STATE OF INDIANA, et al,	)	
	)	
Defendants.	)	

JUDGMENT ENTRY

This cause of action came on for hearing and trial on February 5, 1976. By notification to the parties, the Court considered the defendants' motion to dismiss as a motion for summary judgment (Rule 12 and Rule 56, Federal Rules of Civil Procedure). Argument having been made by the parties, the Court thereupon overruled said motion and proceeded to trial on the issues as presented by the pleadings of the parties. The Court had previously entered a preliminary injunction on behalf of the plaintiff and against the defendant in connection with these proceedings on January 20, 1975.

On February 5 and 6, 1976, said cause of action was tried before the Court on the basis of the plaintiff's amended complaint in which the defendants were the State

of Indiana, Indiana State Highway Commission and the individual members of said Commission.

Whereupon the Court, having considered the evidence presented by the parties and the briefs submitted and arguments made by counsel and now being duly advised in the premises, it is

ORDERED, ADJUDGED AND DECREED:

1. That the preliminary injunction heretofore issued by this Court on January 20, 1975, be, and the same is hereby, DISSOLVED.

2. That the Court now finds in favor of the defendants and against the plaintiff and that the plaintiff take nothing by its complaint.

3. That the costs of this action be taxed against the plaintiff.

DATED this 2nd day of April, 1976.

JAMES E. NOLAND, U. S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
Plaintiff,	)	
vs.	)	CAUSE NO. IP 74-688-C
STATE OF INDIANA, et al,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff herein is an Ohio limited partnership operating a shopping center complex in South Bend, Indiana, doing business as Scottsdale Mall. The defendants are the Indiana State Highway Commission (hereinafter ISHC) and its individual members acting for and on behalf of the State of Indiana. See, Ind. Code 1976 §§ 8-13-3-7, 8-13-5-8, 8-13-5-12.

The general subject of this controversy encompasses the projected development of the by-pass around the southeast quadrant of the South Bend-Elkhart metropolitan area (hereinafter East By-Pass). This highway improvement would traverse a path from existing U.S. 31 South of South Bend, at the point where an existing federally funded by-pass of the southwest quadrant of South Bend intersects U.S. 31 (hereinafter West By-Pass), to a point on existing U.S. 20 east of Elkhart. The principal dispute herein focuses on the center line of one segment of the East By-Pass which bisects plaintiff's property near the western terminus of the project at U.S. 31.

As presently planned, a 3.8 mile segment of the East By-Pass from U.S. 31 east to State Road 331 (hereinafter First Segment) would intersect and sever plaintiff's property thereby permanently removing five hundred ninety-nine (599) parking spaces and rendering inoperative expansion of the complex inherent in its design. On June 11, 1974, plaintiff attempted to avoid these consequences by offering to transfer to the defendants a 20 acre parcel of land south of Scottsdale Mall and to provide waivers of damage claims from the plaintiff, its mortgagor and tenants, if the defendants would agree to relocate the center line of First Segment so that it traversed the adjacent twenty acre tract. This proposal has been styled "Alternate B" by the parties herein. The plaintiff asserts the acquisition cost of its property under the original design of the First Segment would be $2.4 million, while Alternate B would result in a gift to the State of land valued by plaintiff at $600,000.

After considering various alternatives, the ISHC advised the plaintiff on December 5, 1974, of the defendant's intention to proceed with the First Segment of the East By-Pass as originally proposed. As of that date, the defendants had maintained their option to obtain federal highway funds for construction of the First Segment by programming this section of highway for such assistance as required by federal statute and regulations.

The plaintiff thens ought a permanent injunction in this Court prohibiting the defendants from taking further action in connection with the First Segment on the grounds that (1) ISHC had failed to comply with the National Environmental Policy Act 42 U.S.C. § 4321 *et seq.* (hereinafter NEPA) and the regulations issued pursuant thereto and had also failed to comply with the parallel state

environmental statute, see Ind. Code 13-1-10-1 *et seq.* and (2) ISHC by refusing to accept Alternate B acted in an arbitrary and capricious manner detrimental to the taxpayers of Indiana and the City of South Bend. On January 20, 1975, the Court issued a temporary injunction prohibiting the defendants from proceeding further in this matter and restraining plaintiff from making any capital improvements on its property pending a final determination of the issues before the Court.

The defendants subsequently decided to construct the East By-Pass without federal assistance and took steps to de-program this project from further federal consideration. As a result, the federal government was dismissed as a party defendant herein. This cause then came on for a hearing on the defendant's motion to dismiss; the motion was treated as one for summary judgment as authorized by Rule 12(c), Federal Rules of Civil Procedure.

After taking jurisdiction in this matter, the Court proceeded to hear evidence on two issues: First, whether the defendants were required to comply with NEPA and Indiana environmental laws before proceeding with construction on the First Segment and second, whether the defendants acted in an arbitrary and capricious manner by refusing to accept Alternate B.

BACKGROUND

Over twenty years ago ISHC initiated a study of projected highway use along U.S. 20 from a point east of the City of Elkhart to a point west of the City of South Bend. As a result, a four-lane limited access by-pass highway was conceived to alleviate anticipated congestion through the center of the Elkhart-South Bend metropolitan area. The west leg of the by-pass (West By-Pass) from

a point west of South Bend along U.S. 20 to a point south of the City along U.S. 31 has been completed.

The corridor for the aforementioned East By-Pass was established in 1967 after considerable public discussion regarding the general location of the proposed highway. Thereafter, two things occurred: First, private and public development in the area was undertaken with due notice of the proposed centerline of the East By-Pass and second, ISHC programmed segments of the East By-Pass, including the First Segment, for federal highway fund assistance.

In 1968 plaintiff purchased the site of the present Scottsdale Mall and proceeded to build the existing complex. Although plaintiff knew the highway corridor would bisect its property and thereby encroach upon future enlargement of the Mall, Scottsdale Mall was inherently designed for expansion. Four years later, the plaintiff acquired a twenty acre tract adjacent to its property ostensibly for the purpose of future expansion; however, these twenty acres eventually became the locus of the center-line of Alternate B and now stands in the vortex of this controversy.

JURISDICTION

Federal courts have been empowered by Congress to take original jurisdiction over cases arising under the Constitution, laws, or treaties of the United States, 28 U.S.C. § 1331. In determining whether the allegations herein are sufficient to invoke federal subject matter jurisdiction, the Court has employed the analysis commanded by the Supreme Court:

> "[W]here the complaint, as here, is so drawn as to seek recovery directly under the . . . laws of the United States, the federal court . . . must entertain the suit. . . . The reason for this is that the court must assume

> jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief . . . .
>
> "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine the allegations . . . do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 681-682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

The plaintiff contends ISHC has entwined the State with the federal government in the design of the First Segment of the East By-Pass so as to require an environmental impact statement (hereinafter EIS) approved by the Federal Highway Administration before construction begins. On the face of the complaint plaintiff has sufficiently invoked general federal jurisdiction requiring the Court to examine the pertinent parts of the National Environmental Policy Act and the Federal Aid Highway Act to determine whether the plaintiff is entitled to relief.

ELIGIBILITY FOR FEDERAL HIGHWAY ASSISTANCE

Throughout the voluminous record before the Court, plaintiff has advanced two principal arguments for the proposition that an EIS must be completed before construction can begin on the First Segment. Plaintiff relies fore-

most on the proposition that the First Segment is *de facto* a federal highway project and accordingly cannot be withdrawn from federal funding to avoid the full panoply of NEPA's commands. Alternatively, plaintiff contends the entire South Bend-Elkhart metropolitan area By-Pass is a federal project subject to NEPA because the West By-Pass was built with federal funds thereby prohibiting "segmenting" of the East By-Pass to avoid NEPA.

Before turning to the merits of the plaintiff's claims, the Court believes it would be helpful to examine how national policy designed to protect the environment interacts with the complexities of the federal highway aid program.

The National Environment Policy Act, 42 U.S.C. § 4321 *et seq.* embodies a declaration of Congressional policy requiring federal, state, and local governments to use all practical means, including financial assistance, to establish and maintain conditions wherein mankind and nature can exist without fear of mutual destruction. A key provision of NEPA directs the federal government to:

> "(c) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action . . ." 42 U.S.C. § 4332.

Pursuant to NEPA the Federal Highway Aid Program 23 U.S.C. 101 *et seq.* requires each State Highway Agency in designing a highway project eligible for federal funds, 23 C.F.R § 771.4(a) to complete an EIS "during the location stage, prior to the selection of a particular location." 23 C.F.R. § 771.5(b). Thus, a State Highway Commission's

failure to complete an EIS as directed by Federal statute and regulation prohibits the Federal Highway Administration (hereinafter FHWA) from authorizing federal funds for any proposed highway construction.

A State Highway Commission preserves its eligibility for federal highway assistance by complying with each of the three phases of the Federal Highway Act. Successful completion of each stage of the application process is required before a state can timely request federal money from the FHWA; however, Congress has reserved to each state the right ultimately to determine for itself which projects shall be federally funded.

> "The authorization of the appropriation of federal funds or their availability for expenditure shall in no way infringe on the sovereign rights of the states to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted state program." 23 U.S.C. § 145.

During the first phase of the application process, a state designates a proposed highway project as falling into one of several highway systems, i.e., Federal Aid Primary, Federal Aid Secondary, Federal Aid Urban, or Federal Aid Interstate. 23 U.S.C. § 103. Thereafter a state may program a project for federal funds. 23 U.S.C. § 105. At this second stage, funds may be programmed for preliminary engineering studies, right-of-way-surveys, right-of-way acquisition, and actual construction.

Programming under § 105 is not a commitment by the federal government to provide federal funds for highway construction, nor is it an application by the state for a commitment of federal funds. Rather, § 105 programming is a budgeting mechanism of the federal government wherein each state earmarks its share of the annual Congres-

sional highway funding authorization, thereby reserving federal money for potential state use. *Movement Against Destruction (MAD) v. Volpe.* 361 F.Supp. 1360 (D.Md. 1973), *aff'd per curiam*, 500 F.2d 29 (4th Cir. 1974).

The final step and critical stage in a state's application for Federal Highway Aid funds occurs when a Highway Commission submits plans, specifications and estimates (hereinafter P.S.&E.) for approval by the Secretary of Transportation. 23 U.S.C. § 106(a). P.S.&E. approval followed by FHWA funding authorization is the point at which a proposed state highway project becomes irrevocably federal in nature, *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2nd Cir. 1972); *Citizens For A Balanced Environment v. Volpe*, 376 F.Supp. 806 (Conn. 1974) *aff'd*, 503 F.2d 601 (2nd Cir. 1974); *Steubing v. Brinegar*, 375 F.Supp. 1158 (W.D. N.Y. 1974); *Movement Against Destruction (MAD) v. Volpe, supra*, and cannot be withdrawn from federal consideration simply to avoid NEPA. *San Antonio Conservation Society v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971).

NEPA

Under federal statutes and regulations, a state highway commission cannot receive federal funds for a major federal-state highway project unless all the procedural requirements of NEPA have been met. See 42 U.S.C. § 4332 and 23 C.F.R. § 771.5(b), *supra*. In order to enforce the EIS requirements of NEPA, a plaintiff has the burden of proving the proposed highway addition is a major federal project within the meaning of NEPA and the Federal Highway Aid Act. Judicial enforcement of the federal legislative scheme to control man's intrusion into nature cannot be obtained unless a plaintiff demonstrates the con-

tested highway project has been programmed for federal funding and subsequently approved by state and federal authorities for federal highway aid money. *City of Highland Park v. Train*, 519 F.2d 681, 694 (7th Cir. 1975).

The Court has closely examined the twenty eight exhibits plaintiff introduced into evidence at trial as well as the exhibits attached to the pleadings and has concluded the only federal participation in the East By-Pass occurred during the programming stage of the project's development. ISHC's involvement with the federal government was consistent with the legislative scheme designed to maintain a state's option to ultimately request federal highway funds. To this end the federal government expended $162,000 for preliminary engineering studies and right-of-way acquisition which ISHC repaid when it withdrew the East By-Pass from federal highway aid consideration. *See*, affidavit of George D. Gibson, Jr., Division Administrator, FHWA, December 30, 1975. The Court holds that an expenditure of $162,000 for preliminary engineering studies is *de minimus* federal involvement which does not render this highway project a major federal action subject to NEPA.

In reaching this conclusion the Court specifically rejects plaintiff's contention that completion of a majority of the steps depicted on ISHC's work flow chart for the First Segment (plaintiff's Exhibit 2), including location approval, demands characterization of this project as a major federal highway. Plaintiff's reliance on *La Raza Unida v. Volpe*, 488 F.2d 599 (9th Cir. 1973), *cert. denied* 417 U.S. 968, 94 S.Ct. 3171, 41 L.Ed.2d 1138 (1974) in support of its location theory as the point of federal involvement is misplaced. As the Seventh Circuit has pointed out, La Raza was decided under a federal relocation statute and does not control issues arising under NEPA

and the Federal Highway Aid statutes. *City of Highland Park v. Train, supra* at 695.

Under present federal law ISHC's failure to obtain an EIS at the location stage has closed the door to possible federal funding 23 C.F.R. § 771.5(e), a right reserved to each State Highway Commission. 23 U.S.C. § 145. It would be impractical for the federal government to expend human and financial resources to complete EIS studies on projects that cannot possibly receive federal funding. NEPA only applies to *major* federal highway projects and not *any* highway project; therefore, ISHC's decision not to comply with the eligibility procedures necessary to maintain their option to receive federal highway funds cannot have the paradoxical effect of producing federal involvement. *Citizens for a Balanced Environment v. Volpe, supra*, 376 F.Supp. at 813: *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611, 634 (E.D. Va. 1973), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 16 (8th Cir. 1973).

The plaintiff's alternative theory for application of NEPA focuses on the assertion that the appropriate length of highway for an EIS in this case is the entire South Bend-Elkhart Metropolitan Area By-Pass. The plaintiff contends an EIS must cover the whole project because the West By-Pass was constructed with federal funds and ISHC's decision to build the East By-Pass with state funds results in an impermissible "segmenting" of a federal highway project to avoid federal environmental policy.

The Court does not dispute plaintiff's position that a state highway project authorized for federal participation by the Secretary of Transportation must comply with NEPA. NEPA does not apply, however, to projects approved and constructed before January 1, 1970, the effective date of the Act. *See, Investment Syndicates, Inc. v.*

Richmond, 318 F.Supp. 1038 (Or. 1970); *Brooks v. Volpe*, 319 F.Supp. 90 (W.D. Wash. 1970); *Pennsylvania Environment Council, Inc. v. Bartlett*, 315 F.Supp. 238 (M.D. Pa. 1970). *See also, Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975). Thus, the West By-Pass is not subject to consideration as a length of highway for EIS purposes.

The law is clear that as a partner to authorized federal participation in a highway project, a State cannot subvert national environmental policy by shifting federal funds from an authorized project to avoid the ramifications of NEPA's commands. *San Antonio Conservation Society v. Texas Highway Department, supra*, at 1027. In *San Antonio*, the Texas State Highway Department attempted to withdraw the middle segment of a highway project from federal consideration after the Secretary of Transportation *authorized* federal participation in construction of the two end segments of the project. Notwithstanding the plaintiff's arguments to the contrary, the rule laid down in *San Antonio* does not apply to the instant case because the Secretary of Transportation never authorized federal participation in construction of any segment of the East By-Pass. Furthermore, the Assistant Chief Engineer of the Highway Department, Mr. Walter Frick, testified that the project was not de-programmed for fear the proposed alignment of the First Segment could not withstand EIS scrutiny.

If ISHC wishes to re-open its option to request federal highway funds for the project contested herein, the FHWA has indicated the appropriate length of highway for EIS purposes encompasses the entire East By-Pass from a point on U.S. 31 south of South Bend to a point on U.S. 20 east of Elkhart. (Plaintiff's Exhibit 25). The Court believes this length of highway fully meets the standard set forth in federal regulations:

"(a) A highway section should be as long as practicable to permit consideration of environmental matters on a broad scope and meaningful evaluation of alternatives. A highway section may include, when appropriate, completed as well as uncompleted portions of the highway and one or more future highway projects. Piecemealing proposed highway improvements in separate EIS's is to be avoided. The highway section identified in the EIS or negative declaration should include the total length of highway between logical termini even though only a short length of the total identified highway section is proposed for construction or reconstruction within the multi-year work program." 23 C.F.R. 771.5(a)

The Court takes judicial notice of the existence of U.S. 31 and U.S. 20 as major national highways which qualify as logical termini for a By-Pass around a major metropolitan area. In addition, the East By-Pass meets the test raised by plaintiff that a highway section for an EIS be "as large as is feasible under present construction and financing practices and at least be *independently* supportable by meaningful terminal points." *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973) (emphasis added). The testimony of Walter Frick, George Gibson, and evidence introduced at trial (Plaintiff's Exhibit 18) all support the conclusion that the projected daily volume of traffic on the East By-Pass, 15,000 vehicles today and 30,000 in the year 1991, justifies a characterization of the project as one which has independent significance.

ARBITRARINESS

The real dispute in this cause is ISHC's failure to adopt Alternate B. Plaintiff has accused the defendants of acting in an arbitrary and capricious manner by rejecting the

plaintiff's proposal and deciding to begin construction on the First Segment as originally proposed.

The Court has concluded the East By-Pass has never been a federal highway project and therefore there is no issue before the Court regarding the reasonableness or arbitrariness of a federal administrator's action. *See, Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 91 S.Ct. 814, 28 L.Ed. 2d 136 (1970); *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975). The question remains, however, whether the Indiana State Highway Commission acted in an arbitrary and capricious manner by refusing to adopt Alternate B. The Court notes that the legislature of this state has charged ISHC with the responsibility of promoting the economic growth and welfare of Indiana through a vigorous and competent program of public highway development. Ind. Code 1976 § 8-13-1-2. ISHC has been granted the power of eminent domain to establish highway locations Ind. Code 1976 § 8-13-3-7; however, the exercise of said power is subject to court review. Ind. Code 1976 § 34-11-1-5.

Although courts may engage in the review of decisions concerning highway location, this Court does not have the authority to act as a "super" Department of Transportation which disregards the considerable expertise of a state highway commission and realigns highway corridors according to its own notion of fair play. On review of a highway placement, a federal court:

"... is not empowered to substitute its judgment for that of the state or federal highway authorities. Rather, the review is for the limited purpose of determining whether the responsible officials acted with a full good faith consideration of their legal obligations and whether the actual balance of costs and benefits strucks by the officials was arbitrary...." *Swain v. Brinegar*, 378 F.Supp. 753, 757-758 (S.D. Ill. 1974),

reversed on other grounds, 517 F.2d 766 (7th Cir. 1974).

Under the circumstances presented herein, ISHC's failure to rise to plaintiff's expectations regarding the attractiveness of Alternate B has not approached a level of action which can be characterized as arbitrary or capricious or contrary to law. While plaintiff may disagree with ISHC's decision to proceed with the First Segment, the facts of this case show that decision was the result of expert engineering studies and consideration of the alternatives by the ISHC staff.

In opting against realignment of the center-line of the First Segment, the defendant considered: The Annual rate of inflation for highway construction (38%); the user-benefit ratio of the proposed highway; the impact of impoundment of federal highway funds; the delays which would result from pursuing either the First Segment or Alternate B as a federally funded project; drainage and grade problems created by Alternate B; the costs of utility relocation and the delays attendant thereto; the cost of condemnation proceedings under Alternate B; the integrity and credibility of ISHC; and the delay which would result from redesign of the First Segment to accommodate Alternate B.

If the Indiana State Highway Commission had precipitously rejected the plaintiff's alternative without discussing the relative merits of the proposal, they could be said to have acted arbitrarily. On the other hand, however, it was the plaintiff and not the defendants who built Scottsdale Mall knowing it to be in the path of a proposed highway. The defendants did not exceed the bounds of reasonableness when they determined that additional delay and expense prohibited proceeding with Alternate B either as a state or federal highway project. The overwhelming

evidence before the Court demonstrates the defendants acted with utmost good faith throughout their deliberations and dispatched their duty to the people of Indiana with a constancy of effort.

For the reasons set forth hereinabove, the Court now DISSOLVES the preliminary injunction previously entered in this cause and the Court, after trial of the issues, now finds in favor of the defendants and against the plaintiff. The findings of fact and conclusions of law have not been specifically set forth but are included in the body of the above memorandum as provided by Rule 52, Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
vs.	)	CAUSE NO. IP 74-688-C
STATE OF INDIANA, et al	)	

AMENDED JUDGMENT ENTRY

This cause of action came on for hearing and trial on February 5, 1976. By notification to the parties, the Court considered the defendants' motion to dismiss as a motion for summary judgment (Rule 12 and Rule 56, Federal Rules' of Civil Procedure). Argument having been made by the parties, the Court thereupon overruled said motion and proceeded to trial on the issues as presented by the pleadings of the parties. The Court had previously entered a preliminary injunction on behalf of the plaintiff and against the defendant in connection with these proceedings on January 20, 1975.

On February 5 and 6, 1976, said cause of action was tried before the Court on the basis of the plaintiff's amended complaint in which the defendants were the State of Indiana, Indiana State Highway Commission and the individual members of said Commission.

On April 2, 1976, the Court entered its Judgment Entry and Memorandum Opinion in this cause. Thereafter plaintiffs filed a motion seeking to have this Court amend its Judgment Entry in order to clarify the Court's ruling and

thus make a determination as to whether further action is required from the defendants to meet the requirements of the Indiana Environmental Policy Act. The defendants responded to plaintiffs' motion and a further reply was then filed by plaintiffs herein.

Whereupon the Court, having considered the evidence presented by the parties and the briefs submitted and arguments made by counsel and now being duly advised in the premises, it is

ORDERED, ADJUDGED AND DECREED:

1. That the preliminary injunction heretofore issued by this Court on January 20, 1975, be, and the same is hereby, DISSOLVED.

2. That the Court now finds in favor of the defendants and against the plaintiff and that the plaintiff take nothing by its complaint.

3. That the plaintiff has failed to sustain the burden of proof on the issue of whether the Indiana State Highway Commission (ISHC) has failed to comply with the State Environmental Policy Act, *Ind. Code* 13-1-10-1, *et seq.* Whereupon the Court now abstains from ruling on the state issue and the plaintiff's complaint is now DISMISSED.

This Entry is now made *nunc pro tunc* for April 2, 1976.

DATED this 3rd day of May, 1976.

JAMES E. NOLAND, U. S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
vs.	)	CAUSE NO. IP 74-688-C
STATE OF INDIANA, et al	)	

SUPPLEMENTAL MEMORANDUM

The Court now incorporates herein the findings of fact and conclusions of law as contained in the Memorandum Opinion of April 2, 1976, in this cause.

In the opinion of the Court, the evidence received in this cause of action demonstrates that the Indiana State Highway Commission (ISHC) has considered the environmental impact of the proposed highway project as shown by the prior proceedings herein. A federal environmental impact statement as to this project was previously filed. The filing of the federal EIS or its substantive content may constitute compliance with the Indiana Act.

However, the Court feels that it is unnecessary to decide the issue as to what compliance is required with the Indiana statute since that statute has not been litigated in the state courts.

This Court is now refraining from making any binding decision on this issue which would be considered *res judicata*. Instead the Court is now abstaining on the issue as to whether the Indiana State Highway Commission has complied with the requirements of what is sometimes re-

ferred to as the Indiana Environmental Protection Statute. Based on the proceedings heretofore in this cause, the Court believes ISHC has not been foreclosed from taking further action under this statute if such action is necessary and required. It is the opinion of this Court that such a determination should be made by the appropriate state agency or a state court.

In reaching its decision on the state environmental statute the Court has approved and followed the reasoning of Mr. Justice Clark in *San Antonio* where he stated:

> "The plaintiffs have suggested that Texas would still be bound by its own law . . . and that the Court below would have pendent jurisdiction to enforce this State statute. (citations omitted). There has been no development of this jurisdictional issue in that court. But assuming that the district court would have power to adjudicate this claim on such a jurisdictional basis, I believe it should exercise its discretion not to proceed on this wholly State cause of action and thus avoid a needless decision of State law. *See*, C. Wright, Law of Federal Courts, 62-65 (2d ed. 1970). The mere fact that State law parallels federal law, without more, is no reason to warrant a federal forum in adjudicating a contention that a State may be violating its own statute. Such litigation ought to be strictly the business of State courts." *San Antonio, supra*, at 1029. (Justice Clark concurring in part and dissenting in part.)

IT IS SO ORDERED.

APPENDIX C

STATUTORY PROVISIONS

42 U.S.C. § 4332

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given approrpiate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(ii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the

views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

23 U.S.C. § 103

(a) For the purposes of this title, the four Federal-aid systems, the primary system, the urban system, the secondary system, and the Interstate System, are established and continued pursuant to the provisions of this section.

(b) (1) The Federal-aid primary system shall consist of an adequate system of connected main highways, selected or designated by each State through its State highway department, subject to the approval of the Secretary as provided by subsection (f) of this section. This system shall not exceed 7 per centum of the total highway mileage of such State, exclusive of mileage within national forests, Indian, or other Federal reservations and within urban areas, as shown by the records of the State highway department on November 9, 1921. Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its Federal-aid primary system, as originally designated, said State through its State highway department by and with the approval of the Secretary is authorized to increase the mileage of its Federal-aid primary system by additional mileage equal to not more than 1 per centum of the total mileage of said State as shown by the records on November 9, 1921. Thereafter, it may make like 1 per centum increases in the mileage of its Federal-aid primary system whenever provision has been made for the completion and maintenance of 90 per centum of the entire system, including the additional mileage previously authorized. This system may be located both in rural and urban areas. The mileage limitations in this paragraph shall not apply to the District of Columbia, Hawaii, Alaska, or Puerto Rico.

(2) After June 30, 1976, the Federal-aid primary system shall consist of an adequate system of connected main roads important to interstate, statewide, and regional travel, consisting of rural arterial routes and their extensions into or through urban areas. The Federal-aid primary system shall be designated by each State acting through its State highway department and where appropriate, shall be in accordance with the planning process pursuant to section 134 of this title, subject to the approval of the Secretary as provided by subsection (f) of this section.

(c) (1) The Federal-aid secondary system shall be selected by the State highway departments and the appropriate local road officials in cooperation with each other, subject to approval by the Secretary as provided in subsection (f) of this section. In making such selections, farm-to-market roads, rural mail routes, public school bus routes, local rural roads, access roads to airports, county roads, township roads, and roads of the county road class may be included, so long as they are not on the Federal-aid primary system or the Interstate System. This system may be located both in rural and urban areas, but any extension of the system into urban areas shall be subject to the condition that such extension pass through the urban area or connect with another Federal-aid system within the urban area.

(2) After June 30, 1976, the Federal-aid secondary system shall consist of rural major collector routes. The Federal-aid secondary system shall be designated by each State through its State highway department and appropriate local officials in cooperation with each other, subject to the approval of the Secretary as provided in subsection (f) of this section.

• • •

(e) (1) The Interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

(2) In addition to the mileage authorized by the first sentence of paragraph (1) of this subsection, there is hereby authorized additional mileage for the Interstate System of five hundred miles, to be used in making modifications or revisions in the Interstate System as provided in this paragraph. Upon the request of a State highway department the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within that State selected and approved in accordance with this title prior to the enactment of this paragraph, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System (including urban routes necessary for metropolitan trans-

portation) and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. After the Secretary has withdrawn his approval of any such route or portion thereof the mileage of such route or portion thereof and the additional mileage authorized by the first sentence of this paragraph shall be available for the designation of interstate routes or portions thereof as provided in this subsection. The provisions of this title applicable to the Interstate System shall apply to all mileage designated under the third sentence of this paragraph, except that the cost to the United States of the aggregate of all mileage approval for which is withdrawn under the second sentence of this paragraph, as such cost is included in the 1972 Interstate System cost estimate set forth in House Public Works Committee Print Numbered 92-29, as revised in House Report Numbered 92-1443, increased or decreased, as the case may be, as determined by the Secretary, based on changes in construction costs of such route or portion thereof as of the date of withdrawal of approval under this paragraph and in accordance with that design of such route or portion thereof which is the basis of such 1972 cost estimate. In considering routes or portions thereof to be added to the Interstate System under the third sentence of this paragraph the Secretary shall in consultation with the States and local governments concerned, give preference, along with due regard for interstate highway type needs on a nationwide basis, to (A) routes or portions thereof in States in which the Secretary has heretofore or hereafter withdrawn his approval of other routes or portions thereof, and (B) the extension of routes which terminate within municipalities served by a single interstate route, so as

to provide traffic service entirely through such municipalities.

(3) In addition to the mileage authorized by paragraphs (1) and (2) of this subsection, there is hereby authorized additional mileage of not to exceed 1,500 miles for the designation of routes in the same manner as set forth in paragraph (1), in order to improve the efficiency and service of the Interstate System to better accomplish the purposes of that System.

(4) Upon the joint request of a State Governor and the local governments concerned, the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within any urbanized area in that State selected and approved in accordance with this title prior to the enactment of this paragraph, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System or will no longer be essential by reason of the application of this paragraph and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. The milage of the route or portion thereof approval of which is withdrawn under this paragraph shall be available for designation on the Interstate System in any other State in accordance with paragraph (1) of this subsection. After the Secretary has withdrawn his approval of any such route or portion thereof, whenever responsible local officials of such urbanized area notify the State highway department that, in lieu of a route or portion thereof approval for which is withdrawn under this paragraph, their needs require a nonhighway public mass transit project involving the construction of fixed rail facilities, or the purchase of passenger equipment, including rolling

stock for any mode of mass transit, or both, and the State highway department determines that such public mass transit project is in accordance with the planning process under section 134 of this title and is entitled to priority under such planning process, such public mass transit project shall be submitted for approval to the Secretary. Approval of the plans, specifications, and estimates for such project by the Secretary shall be deemed a contractual obligation of the United States for payment out of the general funds in the Treasury of its proportional share of the cost of such project in an amount equal to the Federal share which would be paid for such a project under the Urban Mass Transportation Act of 1964, except that the total Federal cost of all such projects under this paragraph with respect to such route or portion thereof approval of which is withdrawn under this paragraph, shall not exceed the Federal share of the cost which would have been paid for such route or portion thereof, as such cost is included in the 1972 Interstate System cost estimate set forth in table 5 of House Public Works Committee Print Numbered 92-29, as revised in House Report Numbered 92-1443, increased or decreased, as the case may be, as determined by the Secretary, based on changes in construction costs of such route or portin thereof as of the date of withdrawal of approval under this paragraph and in accordance with that design of such route or portion thereof which is the basis of such 1972 cost estimate. Funds apportioned to such State for the Interstate System, which apportionment is based upon an Interstate System cost estimate that includes a route or portion thereof approval of which is withdrawn under this paragraph, shall be reduced by an amount equal to the Federal share of such project as such share becomes a contractual obligation of the United States. No general funds shall be obligated

under authority of this paragraph after June 30, 1981. No nonhighway public mass transit project shall be approved under this paragraph unless the Secretary has received assurances satisfactory to him from the State that public mass transportation systems will fully utilize the proposed project. The provision of assistance under this paragraph shall not be construed as bringing within the application of chapter 15 of title 5, United States Code, any nonsupervisory employee of an urban mass transportation system (or of any other agency or entity performing related functions) to whom such chapter is otherwise inapplicable. Funds available for expenditure to carry out the purposes of this paragraph shall be suppelmentary to and not in substitution for funds authorized and available for obligation pursuant to the Urban Mass Transportation Act of 1964 as amended. The provisions of section 3(e) (4) of the Urban Mass Transportation Act of 1964, as amended, shall apply in carrying out this paragraph.

(f) The Secretary shall have authority to approve in whole or in part the Federal-aid primary system, the Federal-aid secondary system, the Federal-aid urban system, and the Interstate System, as and when such systems or portions thereof are designated, or to require modifications or revisions thereof. No Federal-aid system or portion thereof shall be eligible for projects in which Federal funds participate until approved by the Secretary.

• • •

23 U.S.C. § 105(a)

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit

to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

23 U.S.C. § 106(a)

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

23 U.S.C. § 109

(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to

accomplish the foregoing objectives and to conform to the particular needs of each locality.

• • •

(h) Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90 days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:

(1) air, noise, and water pollution;

(2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;

(3) adverse employment effects, and tax and property value losses;

(4) injurious displacement of people, businesses and farms; and

(5) disruption of desirable community and regional growth.

Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines.

(i) The Secretary, after consultation with appropriate Federal, State, and local officials, shall develop and promulgate standards for highway noise levels compatible with different land uses and after July 1, 1972, shall not approve plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he determines that such plans and specifications include adequate measures to implement the appropriate noise level standards. The Secretary, after consultation with the Administrator of the Environmental Protection Agency and appropriate Federal, State, and local officials, may promulgate standards for the control of highway noise levels for highways on any Federal-aid system for which project approval has been secured prior to July 1, 1972. The Secretary may approve any project on a Federal-aid system to which noise-level standards are made applicable under the preceding sentence for the purpose of carrying out such standards. Such project may include, but is not limited to, the acquisition of additional rights-of-way, the construction of physical barriers, and landscaping. Sums apportioned for the Federal-aid system on which such project will be located shall be available to finance the Federal share of such project. Such project shall be deemed a highway project for all purposes of this title.

(j) The Secretary, after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended.

• • •

23 U.S.C. § 110(a)

(a) As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secretary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

23 U.S.C. § 120(a)

(a) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project, financed with primary, secondary, or urban funds, on the Federal-aid primary system, the Federal-aid secondary system, and the Federal-aid urban system shall either (A) not exceed 70 per centum of the cost of construction, except that in the case of any State containing nontaxable Indian lands, individual and tribal, and public domain lands (both reserved and unreserved) exclusive of national forests and national parks and monuments, exceeding 5 per centum of the total area of all lands therein, the Federal share shall be increased by a percentage of the remaining cost equal to the percentage that the area of all such lands in such State, is of its total area, or (B) not exceed 70 per centum of the cost of construction, except that in the case of any State containing nontoaxable Indian lands, individual and tribal, public domain lands (both reserved and unreserved), national forests, and national parks and monuments, the Federal share shall be increased by a percentage of the remaining cost equal to the percentage that the area of all such lands in such State is of its total area, except that the Federal share

payable on any project in a State shall not exceed 95 per centum of the total cost of any such project. In any case where a State elects to have the Federal share provided in clause (B) of this subsection, the State must enter into an agreement with the Secretary covering a period of not less than one year, requiring such State to use solely for highway construction purposes (other than paying its share of projects approved under this title) during the period covered by such agreement the difference between the State's share as provided in clause (B) and what its share would be if it elected to pay the share provided in clause (A) for all projects subject to such agreement.

23 U.S.C. § 145

The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

Supreme Court, U. S.
FILED
JUN 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. 76-1609

STATE OF INDIANA,
Petitioner,

vs.

SCOTTSDALE MALL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRISON W. SMITH, JR.
SMITH & TOBIN
37 West Broad Street
Columbus, Ohio 43215

WILLIAM P. WOODEN
WOODEN, STARK, MCLAUGHLIN & STERNER
1100 Merchants Bank Building
Indianapolis, Indiana 46204

Attorneys for Respondent
Scottsdale Mall.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio

TABLE OF CONTENTS

	Page
STATEMENT OF CASE	1
ARGUMENT	6
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Ely v. Velde, 497 F.2d 252 (4th Cir., 1974)	8, 9, 13
LaRaza Unida v. Volpe, 488 F.2d 559 (9th Cir., 1973), at p. 562	8, 10, 13
Named Individual Member of San Antonio Con. Society v. Texas Highway Department, 466 F.2d 1013 (5th Cir., 1971)	8, 10, 13
Scherr v. Volpe, 466 F.2d 1027 (7th Cir., 1972)	9

Statutes

23 U.S.C. §145	8
42 U.S.C. §4321	1
Indiana Code, 8-13-2-12	3

STATEMENT OF THE CASE

Petitioner fails to provide the relevant substantive sequence of events and hence fails to state and address itself to the question before and decided by the Court of Appeals. That sequence is clearly set forth at pages 2 through 7 of the Opinion of the Court of Appeals and, somewhat rearranged, is as follows:

1. The so-called "South Bend bypass" of U.S. 20 from west of South Bend to east of South Bend began in the early fifties and it was until 1973 exclusively and as to each of its segments a federal project. As of 1973, the western segment from U.S. 20 to U.S. 31 had been completed. The remainder of the bypass was, for construction purposes, divided into three segments, the first of which was from U.S. 31 east to U.S. 331 and is the segment which immediately involves respondent's land. As of 1973, as to this segment, 214 of the total of 237 steps necessary for the construction of a federal highway had been accomplished. The segment had received program approval, location approval and design approval; some $162,000 of federal money had been expended for preliminary engineering which was virtually completed; and the State was proposing to go forward with land acquisition, the final preparatory action to actual construction of the segment.

2. In 1970, the Congress enacted The National Environmental Policy Act (NEPA), 42 USC §4321, et seq. Petitioner has conceded that NEPA applied to this and other projects even though commenced prior to the enactment of NEPA. Petitioner has also conceded, in the District Court and in the Court of Appeals, that as of 1973, the South Bend bypass and all and each of its parts or segments constituted "major

federal action" requiring compliance with NEPA. Subsequent to the enactment of NEPA, the federal authorities repeatedly advised petitioner that NEPA compliance, specifically the preparation and processing of an Environmental Impact Statement, would be required in connection with the remaining segments of the bypass.

3. In 1973, petitioner requested permission from the federal authorities to commence right-of-way acquisition on the subject segment from U.S. 31 to U.S. 331. This permission was denied due to petitioner's continued failure to seek NEPA compliance. Petitioner then advised that it would proceed with this first segment of the remaining three segments as a State project without further federal funding. The federal authorities thereupon and correctly advised that the project (the "major federal action") for NEPA purposes was the remainder of the bypass, the three segments yet to be built. Petitioner did not and does not contest this determination. Rather, in May of 1974, petitioner prepared and submitted a so-called Environmental Impact Statement which purported to cover all three of the easterly segments and this document was accepted and/or approved by the federal authorities.

4. In 1968, respondent acquired the shopping center site. At that time, respondent was aware that the petitioner planned to build the highway and that it might take a certain portion of the site. Prior to the purchase and subsequent to it and prior to the construction of the center, respondent repeatedly sought to discover when or if it was to be built and, if it was to be built, to affect a minor relocation to avoid losing part of the site. On every occasion, over a period of three or four years, the response was the same: it was too late, the

project would go forward forthwith. And, nothing happened. Finally, respondent, faced with the demands of its major potential tenants that it proceed or else and with the full knowledge of petitioner, began and ultimately completed the construction of its $20 million dollar facility. Petitioner had a statutory means of preventing construction by giving notice of its intention to take, which notice was never given. Indiana Code, Section 8-13-2-12.

5. Respondent's request for relocation continued. In 1972, respondent acquired 20 acres south of the shopping center and in 1974 presented petitioner with several engineered relocation alternatives involving this 20 acre parcel and offered to give petitioner the required right-of-way for the relocated highway. This was an offer that even petitioner recognized as offering a savings of over $2 million dollars. This offer was considered for some six months and finally rejected by petitioner in late 1974.

6. This action was commenced in January of 1975 against petitioner and the United States Department of Transportation. Immediately, the Department of Transportation withdrew its prior approval of the so-call Environmental Impact Statement. The Statement was described as "procedurally defective." This was a reference to the fact that it had not been properly circulated. The defect, while procedural, was not technical since, whether the affect of a given "major federal action" upon the total human environment is ecological or economic, the essence of the NEPA process is full disclosure circulation, reaction and comment. In addition, the EIS was patently substantively inadequate. It was a pitiful pretense. It dealt with the facts of the past and ignored the realities of the present; and

it could have been about any section of highway in these United States if one but changed some names.

7. On February 12, 1975, the District Court entered a preliminary injunction, without the necessity of a hearing but based on the agreement of the parties. For all intents and purposes the parties agreed that the remaining segments of the bypass were a "major federal action" to which NEPA applied and that there had been no compliance with NEPA. The District Court and the parties recognized and concluded that the petitioner had three options: (1) comply with NEPA; (2) do nothing; (3) or withdraw the entire project from federal funding which would then present for trial the issue of whether withdrawal at this stage could avoid NEPA compliance.

8. In January of 1975, President Ford had released previously impounded federal highway funds. This resulted in a maximum availability of $185 million dollars to the State of Indiana which had to be allocated or spent by July 1, 1975. It became imperative to qualify a sufficient number of highway projects in Indiana to absorb the total fund since the penalty for failure to use the money was the loss of that which wasn't spent or at least allocated. Therefore, at the time of and for some time after the District Court's Order it was imperative that the bypass be retained as a federal project in the event that it was needed, as a target for the unspent portion of the unimpounded funds. However, petitioner was able by July 1 to allocate all the federal money to other and presumably less controversial projects. Accordingly, petitioner advised the District Court by copy of a letter to the State Attorney dated July 15, as follows:

"The Honorable Theodore L. Sendak
Attorney General
State of Indiana
Room 219, State House
Indianapolis, Indiana

Attention: Deputy Attorney General Tony Metz

Dear Sir:

The action taken in Washington this year to release Federally impounded highway funds has resulted in a greatly increased use of these funds by the Indiana State Highway Commission. In the Fiscal Year just ended, we have used over 185 million dollars of Federal funds, whereas our original obligation authority only amounted to 72.5 million dollars. This means that the formerly impounded funds will not be available for future work by the State Highway Commission.

As indicated in the attached memorandum, our staff has reviewed the future program planning and determined that a transfer will be necessary for several projects from Federal-aid financing to 100% State financed projects. We have today initiated the transfer of a portion of these projects which includes the projects on U.S. 20 from 0.4 miles east of State Road 331 to present U.S. 20, east of Elkhart.

In view of this action, it is requested that you take the appropriate steps to resolve the current litigation in Federal Court pertaining to the U.S. 20 projects and notify this office when we may proceed. I am transmitting herewith a copy of the de-programming documents, which have been submitted to the Division Office of the Federal Highway Administration on this date.

Very truly yours,
Richard A. Boehning
Chairman"

9. As petitioner admits, the transfer of this project from federal to state incurs no loss of federal funds and is but "a balancing act." You simply move projects back and forth, at will, being sure only to have sufficient projects, qualifying for federal money, to be sure that you spend all the federal money.

10. Subsequent to the letter of July 15, the District Court heard the case on the merits and held that petitioner's action of July 15 withdrawing the project from federal funding enabled petitioner to avoid compliance with NEPA. The Court of Appeals reversed holding, in essence, that the State could waive federal funding but could not, on the facts in this case, by that process, avoid compliance with NEPA.

11. The question before the Court of Appeals and the question decided by the Court of Appeals was not whether the bypass or its segments constituted a major federal action to which NEPA applied. We all agreed. It was and it did. Nor was the question whether the petitioner could waive federal funding. It had and it could. Nor was the question the precise point at which a highway project becomes federal, the Court, deeming such a decision unnecessary. The single question was whether, on the facts of this case, petitioner's act of withdrawing the project from federal funding enabled it to escape and avoid compliance with NEPA.

ARGUMENT

Petitioner's argument in the Courts below was that the State had a continuing option to use federal funds up to the point of Plans, Specifications & Engineering (PS&E) approval and that its obligation to comply with NEPA came and went with the retention of that

option. PS&E is the last step in the process prior to actual construction, so petitioner's argument was that a project could be pulled from federal funding and the necessity for NEPA compliance right up to the point of construction. Petitioner also acknowledged that the process involved no loss of federal funds since all that was involved was a transfer of projects back and forth from State to federal maintaining sufficient federal projects to use all the available federal money. The difficulty with this argument is that it provides a process which destroys the procedural guarantees contained in NEPA and aborts its substantive effect. What can and will happen is that highway projects at the State level will be divided into those which are tentatively to be federal and those tentatively State. The federal projects can then be processed with the same pro forma compliance with NEPA as occurred in this case with the same cooperation, on that pro forma compliance, from the federal authorities as we had here, since the federal bureaucracy is no fonder of NEPA than are the State bureaucracies. With reference to each federal project, if there is no complaint up to the "final step" of funding authority, it is then funded federally and immediately built and it is too late for anyone to demand compliance with NEPA. If a complaint is made with reference to a federal project prior to that "final step" that project is deprogrammed to a State project and some other State project is made federal and no compliance with NEPA is required and no federal dollars are lost. If the argument were to be accepted what the concerned citizens of this country get, whether their concern is wildlife or wild water, the urban society or the urban economy, is either token pro forma compliance with NEPA in non-

controversial projects or none at all where controversy exists.

The Court of Appeals rejected petitioner's argument on the basis of the mandate contained in NEPA. The Court said:

> "Were we to hold otherwise, we would give little, if any, effect to the Congressional directive so cogently expressed by the phrase 'to the fullest extent possible.'" (Petitioner's Appendix A-11)

The Court held that petitioner could not avoid NEPA by the expediency of withdrawal from federal funding and juggling federal and state money. That decision is in total accord with the decisions of Ninth, Fifth and Fourth Circuits. We refer to:

> *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir., 1973),
>
> *Named Individual Member of San Antonio Con. Society v. Texas Highway Department*, 466 F.2d 1013 (5th Cir., 1971);
>
> *Ely v. Velde*, 497 F.2d 252 (4th Cir., 1974).

Petitioner's argument is an understandable effort to convince this Court that the questions in this case are of some broader significance. First, there is at page 6 a reference to "federalism" and at page 11 to 23 U.S.C. 145 to the effect that the fact of federal funding "shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed." This case has nothing to do with federal-state conflict or state's rights. It does have to do with the fact that federal funds carry with them the obligation to comply with federal law. Next, at page 10, petitioner actually claims that the Court of Appeals has created "an impossible situation" since the EIS would be the responsibility of the Department

of Transportation which is not a party and "has no interest in the bypass" since it is not to be federally funded. This is simply an effort to create a problem where none exists. It is the State of Indiana who insisted that NEPA compliance was not required. The Court of Appeals ruled otherwise and enjoined the State from proceeding with the project without NEPA compliance and there is every reason to presume that the federal government will respond to and comply with the law as found to be by a Federal Court.

Petitioner at pages 7, 9, 10-11 presents an argument, part of substance and part of procedure, which was not made before either the District Court or the Court of Appeals and not worth making there or here. Petitioner at page 7 states that there is really no federal involvement in highways as such; that the federal involvement is in the financing of highways not their construction. Petitioner seems to conclude at page 9 and again at page 11 that: a highway cannot be a "major federal action;" only the money is; the EIS requirement does not apply directly to the State; and in the event of "a violation of the EIS requirements" all a Court can do is stop the Federal authorities from the payment of the money (which the State keeps anyway by moving it to another project) but it can't stop the State or the project. This is inane. There must be twenty cases dealing with the applicability of NEPA to different actions, including those cited by petitioner and every one defines actions in terms of the project itself, not the money. Indeed, some of the cases don't even involve money. In addition, in case after case, the order of the Court has been directed against the project and against the State. We refer to *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974) and *Scherr v.*

Volpe, 466 F.2d 1027 (7th Cir. 1972). In *Named Individual Members of San Antonio Con. Society v. Texas Highway Dept.*, 466 F.2d 1013 (5th Cir. 1971), the State of Texas argued that withdrawal from federal funding affected the substantive result that NEPA compliance was avoided and the procedural result that it could not be required. The Court at page 1027 responded:

> "We are not impressed with this argument. If we were to accept it, we would be giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws. The supremacy of federal law has been recognized as a fundamental principle of our Government since the birth of the Republic. United States Constitution, Art. VI, cl. 2. The State may not subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another."

And in *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir. 1973) the State of California made the precise argument here made by the petitioner in connection with a similar federal statute. That argument and the Court's response to it appears at page 561:

> "The Commission's position on this appeal is that these provisions are applicable only in the sense that compliance is necessary in order to obtain federal funding. Under this interpretation the Commission would have an option to obtain federal funding by complying with these provisions. Failure to comply merely would deprive the State of

> federal funds. The determination whether the condition precedent to federal funding had occurred would be appropriate only at the final state of the approval process outlined in 23 U.S.C. §106(a), the so-called 'construction approval.' As a consequence, the Commission argues, it would have been appropriate for the District Court to have entered a declaratory judgment that the statutes here involved were applicable if federal funds are to become available and to have enjoined the Federal Government from making funds available to the project 'until and unless the requirements are met and approved by the Court,' (Appellant's Reply Brief, p. 5.) Under no circumstances should a state be enjoined to comply. The carrot of federal funding, not the stick of an injunction, insists the Commission, is the only compulsion authorized by the applicable statutory and regulatory scheme.
>
> [1] We do not agree with the Commission's interpretation of these provisions. The general purpose of these statutes and regulations is to assure that projects for which federal funding might become available are carried out in a way that will afford the protection both to those displaced that 42 U.S.C. §§4622-4655 provides and to the environment, including public parks, that is commanded by 49 U.S.C. §1653(f) and 23 U.S.C. §138. The effectuation of this purpose makes necessary both the carrot and the stick. Without the stick there will be fewer instances in which compliance with these provisions will be achieved. This is true because the Commission under its interpretation would be able to secure the program approval contemplated by 23 U.S.C. §105 for a greater number of projects than could be funded by the sums apportioned and made available pursuant to 23 U.S.C. §104 and §106(a) and to qualify for actual funding only those projects with respect to which compliance proved to be relatively easy and inexpensive."

Such a constrained view of NEPA is typical of State bureaucracies who don't want to be bothered by such foolish things as the effect upon the human economic and ecologic environment. Such a view insults the plea of the Congress contained in the Act itself, "to the fullest extent possible." Finally, the Act is made applicable to major federal actions "significantly affecting the quality of human environment." It is the project, the highway, created by the money, that affects the human environment.

Petitioner has another new argument at page 12 that insists that the bypass hasn't become "federal" yet since that would occur at the land acquisition stage or maybe the construction stage, because it is land acquisition and construction that produce the affect on the environment. In the first place, the bypass is well into the land acquisition phase and counsel must be aware that virtually all the land for the U.S. 31/U.S. 331 segment has been acquired. Secondly, to argue that you don't have to comply with NEPA until after you've constructed the highway doesn't make sense. The guts of NEPA is the necessity for consideration of all alternatives. Finally, the argument in this case was not and is not that the bypass has not become federal. We've all acknowledged it did. Why else did the State prepare and file an EIS? Why else did the State "withdraw" the project from federal funding? The argument is that the State insists that they can defederalize the project in order to avoid NEPA compliance.

Petitioner's final plea appears at page 13 where this marvelous statement appears: "If there is *any* holding of the Court of Appeals in this case, *such* holding creates a conflict among the circuits. . . ." (Emphasis

ours) In other words: whatever the Court of Appeals said, someone must disagree. The Court of Appeals, in its opinion, stated "The precise point at which a federally programmed state highway project becomes irrevocably federal in character for NEPA purposes is a decision we deem unnecessary to make. . . ." (Petitioner's Appendix A-11) The Court went on to say that whatever this "precise point" might be it had long since passed in this case. Hence, the rule in this case is on the facts of this case and it is this: where a State proceeds with a highway project as a federal project up to the very point of construction, purporting to comply with NEPA during that entire time, and where that compliance is attacked and held by a federal court to be inadequate, that State cannot avoid full compliance and the injunctive order of the Court by the simple expedient of withdrawing the project from federal funding and by shifting state and federal funds from project to project so as to suffer no loss of federal funds. Such a holding is totally in accord with the rule in other circuits. We refer again to: *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir., 1973), at p. 562; *Named Individual Member of San Antonio Con. Society v. Texas Highway Department*, 466 F.2d 1013 (5th Cir., 1971); *Ely v. Velde*, 497 F.2d 252 (4th Cir., 1974). And such a holding is the only holding which affords to NEPA an ounce of substance. Petitioner cites no case in which withdrawal from federal funding at any time, by any means, or for whatever purpose has been held to constitute a means of NEPA avoidance.

Petitioner concludes with the remarkable statement that "[U]ntil land acquisition and construction are *ready to proceed* any action is *de minimus* rather than

major, is state rather than federal, and does not significantly affect the quality of the human environment." (Emphasis ours) This case began because acquisition of our land was proceeding and construction was ready to begin. So even in the words of petitioner: the action is major; the action is federal; the action significantly affects the quality of the human environment.

CONCLUSION

The issue here is whether petitioner can avoid NEPA, by bookkeping transfer of federal funds to other projects. The Court of Appeals held that the project before the Court had gone so far as a federal project and was so near the point of construction that the Court of Appeals wasn't presented with any nice problem as to the precise earliest point at which NEPA becomes applicable. By any test, this project had long since passed that point.

Thus, the decision of the Court of Appeals merely followed the established decisions of other circuits to the effect that once NEPA is applicable Petitioner cannot withdraw from NEPA and avoid its application and subvert the purposes of NEPA by bookkeeping changes to shift the federal funds to other projects.

Respectfully submitted,

HARRISON W. SMITH, JR.
SMITH & TOBIN
37 West Broad Street
Columbus, Ohio 43215

WILLIAM P. WOODEN
WOODEN, STARK, MCLAUGHLIN & STERNER
1100 Merchants Bank Building
Indianapolis, Indiana 46204

Attorneys for Respondent
Scottsdale Mall.

FILED
JUN 30 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1609

STATE OF INDIANA,

Petitioner,

vs.

SCOTTSDALE MALL,

Respondent.

REPLY BRIEF IN RESPONSE TO BRIEFS OF THE STATES OF SOUTH CAROLINA AND PENNSYLVANIA

HARRISON W. SMITH, JR.
SMITH & TOBIN
37 West Broad Street
Columbus, Ohio 43215

WILLIAM P. WOODEN
WOODEN, STARK, MCLAUGHLIN & STERNER
1100 Merchants Bank Building
Indianapolis, Indiana 46204

Attorneys for Respondent
Scottsdale Mall

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Pages
Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), cert. den., 409 U.S. 1000 (1972)	4
Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir.), cert. den., 409 U.S. 1047 (1972)	7
Citizens For A Balanced Environment v. Volpe, 376 F.Supp. 806 (D. Conn.) aff'd, 503 F.2d 601 (2nd Cir., 1974), cert. den., 423 U.S. 870 (1975)	5
Ely v. Velde, 451 F.2d 1130 (4th Cir., 1971)	7
Ely v. Velde, 497 F.2d 252 (4th Cir., 1974)	7, 8
James River & Kanawha Canal Parks v. Richmond Metropolitan Authority, 359 F.Supp. 611 (E.D. Va.) aff'd, 481 F.2d 1280 (4th Cir., 1973)	3
LaRaza Unida v. Volpe, 488 F.2d 559 (9th Cir., 1973)	3, 4, 6, 8
Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2nd Cir., 1972)	4
Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dept., 466 F.2d 1013 (5th Cir., 1971), cert. den., 406 U.S. 933 (1972)	4, 5
Proetta v. Dent, 484 F.2d 1146 (2nd Cir., 1973)	6

Statutes	
23 C.F.R. §771.5(b)	3

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1609

STATE OF INDIANA,
Petitioner,

vs.

SCOTTSDALE MALL,
Respondent.

REPLY BRIEF IN RESPONSE TO BRIEFS OF THE STATES OF SOUTH CAROLINA AND PENNSYLVANIA

The basic reason urged by the State of South Carolina for the writ is a conflict among the circuits. However, the basic argument of South Carolina is that a state highway, proposed for federal financing, "can never become a federal project." This conclusion is based upon the assertion that a State does and must have a continuing right to proceed with any project with State funds and that this right is guaranteed by 23 U.S.C. §145. As we have previously stated, the Seventh Circuit in no wise denied Indiana the right to proceed with the bypass with State funds and without federal funds or the right of any other State to do the same. What this case involves is the right and/or ability of a State to take a federal highway project to which NEPA applies and has applied and which has

proceeded under federal auspices up to the point of construction and switch it to a State project in order to avoid the obligation of NEPA compliance. As we have pointed out, every circuit faced with this question has concluded that the withdrawal from federal funding does not avoid the NEPA obligation. And, no circuit has concluded that with the federal funds goes the obligation to comply with NEPA or the right of a party plaintiff to require NEPA compliance by a State. Nor has any federal court agreed with the contentions of South Carolina that a "federal-aid highway can never become a federal project" or that NEPA doesn't apply to the several states where they participate in federal action. Quite the contrary, every federal court dealing with the subject has concluded that federal-aid highways are major federal actions and that the State in participating in such a highway is amenable to NEPA and judicial enforcement of the requirements of the Act.

So in terms of the first and basic argument of South Carolina, there is no conflict among the circuits; there is no case which supports that argument which is best evidenced by the fact that South Carolina cites no case in support of it.

The second argument of the State of South Carolina assumes that a federal-aid highway project can become federal for NEPA purposes and deals with the point in time when that occurs, the State urging that a conflict exists among the circuits on this question. In discussing this question, it is important to remember that the essence of the NEPA process is the Environmental Impact Statement (EIS) and the examination of alternatives required therein. To make the EIS meaningful, it obviously has to be prepared and circulated early in the process; hence, the requirement in 23 C.F.R. §771.5(b) that the EIS "be completed during the location stage, prior to the selection of a particular location."

South Carolina urges that this Court grant certiorari in order to decide the precise time at which a federal-aid highway becomes irrevocably amenable to NEPA and to resolve a perceived conflict on this point among the circuits. But the Court of Appeals in this case made no decision as to that precise point and in fact found that no such decision was necessary. Here we had a case where the State acknowledged NEPA applicability right up to the point of construction. If it wasn't federal for NEPA purposes at that point, it never could be. All the Court held was that a State having gone that far could not circumvent NEPA by a bookkeeping transaction.

So the decision sought by South Carolina is not responsive to the decision of the Court of Appeals in this case. In addition, the conflict South Carolina perceives, if it exists at all, is between other circuits not between other circuits and the instant decision of the Seventh Circuit. No circuit has held that, under the circumstances of this case, circumvention is possible. Finally, there is no real conflict in the decisions of other circuits. In *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir., 1973) the Ninth Circuit held that the point of NEPA applicability was location approval. In no wise is the ruling of *James River & Kanawha Canal Parks v. Richmond Metropolitan Authority*, 359 F.Supp. 611 (E.D. Va.) aff'd, 481 F.2d 1280 (4th Cir., 1973) in conflict with *LaRaza Unida*. The District Court decision, which was affirmed per curiam and without comment by the Fourth Circuit, was based upon the fact

that there was no federal involvement in the project at all. But at page 633 of *James River* appears the clearest and fullest statement possible of total agreement with the Ninth Circuit in *LaRaza Unida* and with the Seventh Circuit in this case. Nor does *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), cert. den., 409 U.S. 1000 (1972) present any conflict. In that case an injunction was ordered by the Fourth Circuit against federal and state defendants. The argument advanced by defendants was that it was too late to require NEPA compliance since the project was in the Plans, Specifications & Estimates (PS&E) stage when the Act became effective. All the Fourth Circuit said was that even at PS&E it was not too late to require NEPA compliance. The case of *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2nd Cir., 1972) is identical to *Arlington Coalition* and too presents no conflict. The Second Circuit simply held that the project was not too far along to require NEPA compliance and required it. Neither is there any conflict posed by the decision of the Fifth Circuit in *Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dept.*, 466 F.2d 1013 (5th Cir., 1971), cert. den., 406 U.S. 933 (1972). The Court held that the project had been federal "since the Secretary of Transportation authorized federal participation in the project on August 13, 1970." The action of August 13, 1970 in *San Antonio* was an authorization for construction. It also was the initial federal action on the project, there being in the record an affidavit of the Secretary of the Department of Transportation that prior to August 13 the federal government had never issued any approval of any kind on the project (for the reason that the only federal participation was to be in the actual construction of the highway). The Fifth Circuit did not hold that the project had been federal from the time the Secretary authorized "construction." It held that it had been federal from the time he authorized "federal participation." The holding in *San Antonio* is that the project was federal from the time the State obtained an option for federal funding, not from the time it exercised it. But more important and contrary to the basic argument of South Carolina, *San Antonio* is a case that holds: that a federal-aid highway is "major federal action" for NEPA purposes; that the States are amenable to NEPA and may be enjoined for failing to comply; and that the States may not circumvent and avoid NEPA by the identical bookkeeping "balancing act" used by the State of Indiana in this case.

It is interesting to note that in all of the cases relied upon by South Carolina, save one, the plaintiffs prevailed and an injunction was ordered by the Circuit Court against the federal or the federal and State authorities to cease and desist with reference to a federal-aid highway project. So there is a marvelous consistency among the circuits, the Seventh, the Ninth, the Fourth, and the Second to reject the constrained interpretation of NEPA demanded by the States and to apply NEPA "to the fullest extent possible." The only case in which defendants prevailed is *Citizens For A Balanced Environment v. Volpe*, 376 F.Supp. 806 (D. Conn.) aff'd, 503 F.2d 601 (2nd Cir., 1974), cert. den., 423 U.S. 870 (1975). The appellate decision says nothing as to the question of when NEPA first applies, holding only that it was not applicable. And a footnote at page 813 of the District Court opinion reveals that there was not even a claim that the specific project was

federal in and of itself. The only claim in the case was that the specific and smaller project was federal since it was a part of a larger project that was admittedly federal. The Court rejected this claim and the case has no application here.

So in effect there is no real conflict demonstrable among the circuits with the rule of *LaRaza Unida* and if there were it would not naturally be resolved in a review of the decision of the Seventh Circuit in this case since our Court of Appeals found it unnecessary to resolve the "first point of application" question.

As we have written this response to the State of South Carolina, we have been served with the Brief Amicus of the State of Pennsylvania. In it appears a repetition of the basic argument of South Carolina: that the Seventh Circuit infringes upon the State's right of eminent domain and to separately fund its own projects; that NEPA has no application to the States; and that the sole remedy for a NEPA violation is to enjoin the federal funds, not the project. As we have said, the decision in no way denies to Indiana the right to build the bypass with State funds or to acquire right-of-way for it. And every case on the subject assumes that: at least at some point the price of the option of federal funding is NEPA compliance; in this sense the act involves the States; and the penalty for non-compliance is an injunction against the project—not the money.

In support of its basic argument that the Seventh Circuit could not properly enjoin the State of Indiana, on the facts of our case, Pennsylvania relies upon *Proetta v. Dent*, 484 F.2d 1146 (2d Cir., 1973) which on its facts is just not in point. The basis of the denial of an injunction against the project (i.e. the City of New York) was that the City was not to receive the

federal funds. Indeed, the court infers that, if the City had been the recipient, injunction would be proper.

Pennsylvania also relies on *Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537 (7th Cir.), cert. den., 409 U.S. 1047 (1972) in which there wasn't even a claim of federal involvement. Finally, Pennsylvania at pages 7 and 12 of its brief, relies on *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir., 1971) as authority that NEPA has no application to the States. The case cited is historically referred to as *Ely I*. The case was an action against federal and state officials and dealt with a federal block grant to the State of Virginia to construct a penal institution. The court enjoined the grant pending NEPA compliance but declined to enjoin the State authorities. At this point, as is pointed out in *Ely v. Velde*, 497 F.2d 252 (4th Cir., 1974) (*Ely II*) at 254, the State not having drawn on the grant was free to build the institution with its own funds and with no necessity for NEPA compliance. However, after *Ely I*, the State elected to proceed with the federal financing and the State and federal officials prepared an EIS. There was adverse reaction and the State attempted to proceed using only State funds and shifting the federal grant to other less controversial projects. The plaintiffs of *Ely I* commenced *Ely II* and in *Ely II* the Fourth Circuit condemned the State officials in language equally applicable to Indiana, saying at page 255:

> "The State may not subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another."

The Court ordered Virginia to pay back the grant resulting in a net loss of federal dollars to the State. In so doing, the Court stated at page 256:

> "Were this a highway construction case we would not hesitate to grant an injunction."

The Court goes on at page 257:

> "Unlike the segment of a highway whose *location* has been *approved*, the construction of the center does not involve an inseparable relationship . . . ." (Emphasis ours)

The rule of *Ely II* is the rule of *LaRaza*: NEPA applies to highway projects which become federal at location approval; and injunction is appropriate against a State to prevent circumvention or avoidance.

CONCLUSION

Neither Indiana, South Carolina, nor Pennsylvania can cite a case to support their basic and constrained view that federal-aid highways never become federal; that NEPA can't apply to State action even when coupled with and a part of federal action; and that the project can't be enjoined in order to prevent subversion of the Act. Further the secondary argument that certiorari ought to be granted at least to resolve conflict as to when such projects come with the NEPA umbrella fails because the very cases cited in support of conflict show that no such conflict exists. Finally, if such a conflict existed, its resolution would not and could not form a necessary element in the decisional process in the case at bar.

Respectfully submitted,

HARRISON W. SMITH, JR.
SMITH & TOBIN
37 West Broad Street
Columbus, Ohio 43215

WILLIAM P. WOODEN
WOODEN, STARK, MCLAUGHLIN & STERNER
1100 Merchants Bank Building
Indianapolis, Indiana 46204

Attorneys for Respondent
Scottsdale Mall

Supreme Court, U. S.
FILED
JUN 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1609

STATE OF INDIANA, PETITIONER,

versus

SCOTTSDALE MALL, RESPONDENT

BRIEF FOR THE STATE OF SOUTH CAROLINA, AS AMICUS CURIAE IN SUPPORT OF INDIANA'S PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
Attorney General

MARVIN C. JONES
Assistant Attorney General

F. KIMBALL JOYNER, JR.
Assistant Attorney General
P. O. Box 191, Room 306-A
Columbia, South Carolina 29202.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Question Presented for Review	4
Statement of the Case	4
Reasons for Granting the Writ of Certiorari	4
A. There is a conflict among the circuits as to when a project becomes 'federal' so as to be irrevocably subject to the National Environmental Policies Act	5
B. The enactment of 23 U.S.C. § 145 is a matter of great importance in the states, and, in the circuits with regard to the effect of the National Environmental Policies' Act on state highway projects, this Court should rule on the application of the statute at the earliest practical time	8
Conclusion	11

TABLE OF AUTHORITIES

Cases: Page

Arlington Coalition on Transp. v. Volpe, 458 F. 2d 1323 (4th Cir.), cert. den., 409 U. S. 1000 (1972) 6

Citizens For a Balanced Environment v. Volpe, 376 F. Supp. 806 (D. Conn.), aff'd, 503 F. 2d 601 (2nd Cir. 1974), cert. den., 423 U. S. 870 (1975) 6, 7

Hawthorne Environmental Preservation Ass'n v. Coleman, 417 F. Supp. 1091 (D. Ga. 1976) 7

James River & Kanawha Canal Parks v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va.) aff'd, 481 F. 2d 1280 (4th Cir. 1973) 5, 7

La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cr 1971), aff'd, 488 F. 2d 559 (9th Cir.), cert. den., 409 U. S. 890 (1972) 5

Monroe County Conservation Council v. Volpe, 472 F. 2d 693 (2nd Cir. 1972) 6

Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dept., 446 F. 2d 1013 (5th Cir. 1971), cert. den., 406 U. S. 933 (1972) 6

Northeast Area Welfare Rights v. Volpe, 2 ERC 1704 (E.D. Wash. 1971) 5

Sierra Club v. Volpe, 351 F. Supp. 1002 (N.D. Cal. 1972) 5

State of Nebraska v. Tiemann, 510 F. 2d 446 (8th Cir. 1975) 10

Statutes:

The Federal-Aid Highway Act:
- 23 U.S.C. § 101 .....3, 8
- 23 U.S.C. § 109 8
- 23 U.S.C. § 145 8

National Environmental Policy Act of 1969:
- 42 U.S.C. § 4321 2
- 42 U.S.C. § 4332 .....7, 9

Federal-Aid Highway Act of 1976, Pub. L. No. 94-280:
- 90 Stat. 425 (1976) 7

Federal-Aid Highway Act of 1973, Pub. L. No. 93-87:
- § 133(a), 87 Stat. 261 (1973) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1609

STATE OF INDIANA, PETITIONER,

versus

SCOTTSDALE MALL, RESPONDENT

BRIEF FOR THE STATE OF SOUTH CAROLINA, AS AMICUS CURIAE IN SUPPORT OF INDIANA'S PETITION FOR WRIT OF CERTIORARI

This brief is submitted pursuant to Rule 42(4) of the Rules of this Court by the State of South Carolina in support of the petition of the State of Indiana to obtain a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 16, 1977.

INTEREST OF THE AMICUS CURIAE

The State of South Carolina is a sovereign State of the United States with a substantial interest in supporting Indiana's petition for a writ of *certiorari* in this matter. The basis of the decision of the Seventh Circuit operates adversely upon the sovereignty of the State, and upon the flexibility needed for the planning of federally assisted State highway programs.

The Court of Appeals held that actions of the State of Indiana in the advancement to construction of the east leg of a limited access by-pass of the South Bend-Elkhart metropolitan area constituted a "major federal action" requiring compliance with the National Environmental Policies Act, 42 U. S. C. § 4321, *et seq.* (hereinafter 'NEPA'), even though the project was completely removed from the federal funding program process, and all federal funds committed to the project were returned. Such a decision seriously restricts the well established sovereign right of the States to exercise eminent domain and to construct roadways in the interests of their respective citizens.

The right of a state to condemn property and construct public roads is not limited in time. A state may choose to program a highway in such a manner as to keep open its option to finance the project with federal funds. However, a state may also choose to reject or refuse to accept federal assistance for the project. For these reasons it is clear that a state cannot be barred by the failure of federal officials to conform to the requirement of federal law regarding qualification for federal assistance to state projects. This is because the state has a continuing option to forego federal assistance to any given state project and proceed with state funds only. Admittedly, in order to qualify for federal assistance the state project must qualify under applicable federal statutory law including the appropriate sections of NEPA. However, the remedy for noncompliance with these statutes is a withdrawal of the federal assistance, and not an injunction against the state which in the exercise of its sovereignty may choose to continue to construct the project with state funds.

Planning for highway construction in South Carolina is the responsibility of the Department of Highways and Public Transportation. The Department constructs highways from resources provided by the State and by the biannual Federal-Aid Highway Acts (codified at 23 U. S. C. § 101, *et seq.*). The nature of the legislative authorization-appropriation process, the inherent dependence of the Highway Trust Fund and the South Carolina State Highway Fund on excise tax revenues from the sale of highway use products, principally gasoline, rising costs of highway construction, and variations in local traffic demands make the highway construction planning process difficult at best. Highway planners must advance a sufficient number of projects in a manner to preserve the option for using federal assistance so that a reasonably balanced overall state construction program can be administered. The planning must also insure that the State has the opportunity to use all of the funds apportioned from the Highway Trust Fund. Therefore, it is critical that the State of South Carolina have adequate flexibility in the ultimate designation of projects to receive federal assistance.

For these reasons, South Carolina has a vital interest in seeking review of the lower court's decision construing the relationship between NEPA and the Federal-Aid Highway Act, which, if allowed to stand would effectively prevent the Indiana State Highway Commission from exercising its sovereign right to construct roadways. South Carolina and its Department of Highways and Public Transportation need to know with certainty at what point, if any, its sovereignty is ceded in exchange for federal assistance to state highway construction. In light of the present uncertainty and inconsistency in the Circuits with regard to this matter, effective planning by state highway department and departments of transportation has become unfeasible. It is essential to all of the states that the Supreme Court clearly define the extent to which the Congress has

imposed conditions on the receipt of federal aid for state highway construction.

QUESTION PRESENTED

Whether a state which has programmed a highway construction project in anticipation of advancing it with federal-aid, but has withdrawn the request for federal funding and refunded any money received, may properly be enjoined from constructing the project with state revenues until the completion of an environmental impact statement.

STATEMENT

The statement of the case by the State of Indiana at page 3 of its petition includes a full analysis of the background leading to the decisions of the District Court and of the Court of Appeals and for the sake of brevity we adopt that statement of the case.

REASONS FOR GRANTING THE WRIT

The decision below raises issues of great importance to the states. These include questions of statutory construction regarding the administration of the Federal-Aid Highway Act and the role of the National Environmental Policy Act in relation to this program, and the enormous repercussions of the interpretation of this relationship on the states attempting to implement the program. The holding of the Court below with respect to when a state highway project becomes a major federal action so that an environmental impact statement must be prepared is in direct conflict with holdings in other circuits. It is our position that state projects receiving federal assistance cannot become 'federal' projects; and thus as state projects, they may not be enjoined for failure to comply with obligations imposed upon the federal government. Since NEPA applies only to federal agencies, the remedy for failure of federal officials

to prepare a proper environmental impact statement (hereinafter 'EIS') with regard to a federally assisted project is the withdrawal of federal funds and not an injunction against the state from completing the highway solely as a state project. This very controversial issue has become more confused rather than clarified by the cases considering the subject.

A. There is a conflict among the circuits as to when a project becomes 'federal' so as to be irrevocably subject to the NEPA.

While it is our contention that construction of a state-federal-aid highway can never become a federal project, discussed *infra*, over several years certain Courts of Appeals have found that at varying phases in the advancement of a project, it can become irrevocably federal.

These courts have developed a theory that at some point in the evolution of a highway project it became 'federal' and the obligations of federal assistance attached whether or not a state chose to continue to accept federal assistance. Probably the first of these cases was *Northeast Area Welfare Rights v. Volpe*, 2 ERC 1704 (E.D. Wash. 1971). This case held that a project did not become 'federal' until there were federal funds actually committed. Later cases disagreed sharply as to when a project became 'federal'. The Court in *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), *aff'd*, 488 F. 2d 559 (9th Cir.), *cert. den.*, 409 U. S. 890 (1972), departed from the *Northeast Area Welfare Rights* view and decided that a project became federal at the time of location approval. *Cf. Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972). In *James River & Kanawha Canal Parks v. Richmond Metropolitan Authority*, 359 F. Supp. 611 (E.D. Va.), *aff'd*, 481 F. 2d 1280 (4th Cir. 1973), the Court held that although a highway project might become 'federal' early in the plan-

ning process, some federal participation must have taken place. Indeed, in *Arlington Coalition on Transp. v. Volpe*, 458 F. 2d 1323 (4th Cir.), *cert. den.*, 409 U. S. 1000 (1972), the Fourth Circuit retained jurisdiction over state defendants as a form of pendent jurisdiction in order to effectuate the remedy available against federal respondents.

The Second Circuit appears to have followed the theory that plans, survey, and estimate approval, followed by Federal Highway Administration funding authorization, is the point at which a proposed state highway project becomes irrevocably federal in nature. *Monroe County Conservation Council v. Volpe*, 472 F. 2d 693 (2nd Cir. 1972); *Citizens For a Balanced Environment v. Volpe*, 376 F. Supp. 806 (D. Conn.), *aff'd*, 503 F. (2d) 601 (2nd Cir. 1974), *cert. den.*, 423 U. S. 870 (1975).

In *Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dept.*, 446 F. 2d 1013 (5th Cir. 1971), *cert. den.*, 406 U. S. 933 (1972), there was an indication from the defendant Texas Highway Department that it would build the project in issue using State funds exclusively. The Court would not allow such a procedure. "The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State, as partner in the construction of the project, is bound by those laws." *Id.* at 1207.

The decision of the lower Court in this case is indicative of the uncertainty regarding events which make a state highway project 'federal'. Seeming to express approval of the 'location approval' theory, the Court fails to say exactly why the project in the instant case is a major federal action. It cites a history of federal-state involvement in the project and preliminary financial benefits which "imbued the highway project with a federal character". However, other courts have recognized that the use of limited federal funding during the planning and design stage of a highway project does not constitute 'major federal action' under the NEPA. *Hawthorne Environmental Preservation Ass'n v. Coleman*, 417 F. Supp. 1091 (D. Ga. 1976); *Citizens for Balanced Environment v. Volpe, supra; James River & Kanawha Canal Parks v. Richmond Metropolitan Authority, supra.*

More important, in this case the Court does not have before it the agency administering the federal-aid highway program, the Federal Highway Administration. Thus, the language of the NEPA requiring "all agencies of the Federal government" to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332 can only mean that the State of Indiana operating through its State Highway Commission has become an agency of the Federal government for purposes of NEPA.

It is apparent that there is a degree of conflict in the circuits as to the time when federally assisted state highway construction projects become irrevocably federal in character. We argue, *infra*, that under the present statutory scheme federal assistance can never so impose itself on a state highway construction project as to constitute a waiver by the state of its sovereign right to exercise eminent domain and construct roads using funds generated solely by the state. However, if we are wrong, it is imperative that the states know with clarity those acts by which it cedes its authority over highway construction within its own border, using its own funds.

For fiscal year 1977 almost six and one-half billion dollars were authorized to be apportioned from the Highway Trust Fund. Pub. L. No. 94-280, 90 Stat. 425 (May 5,

1976). South Carolina was apportioned almost sixty-two million dollars as its share. Thus, the issue is important both in terms of resolving a difficult issue of federal-state relationship and in terms of the amount of money involved.

B. **The enactment of 23 U.S.C. § 145 is a matter of great importance in the states and in light of the existing conflict in the circuits with regard to the effect of NEPA on state highway projects, this Court should rule on the application of the statute at the earliest practical time.**

It is apparent from the Federal-Aid Highway Act, 23 U.S.C. § 101, *et seq.*, that the interest of the federal government in the construction of a state highway arises only when the state elects to accept federal assistance. It is also obvious that there is no bar within the Federal-Aid Highway Act to a state from declining federal assistance to a project even though it may have originally been programmed for federal assistance. Additionally, overlooking NEPA for the moment, after such a refusal of federal assistance, there would appear to be no obligation on the state to abide by standards established for federal-aid highways.[1]

Congress enacted 23 U.S.C. § 145[2] to ensure that the states would retain the right to decide which projects would be federally assisted. No doubt it was enacted in response to a line of cases reviewed *supra*, which held that at some point state projects receiving federal assistance would become 'federal'. Section 145 provides:

> The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

[1] For example, 23 U.S.C. § 109 authorizes the Secretary of Transportation to adopt geometric and construction standards which must be met before the approval of plans and specifications may be granted. However, if federal assistance were declined, the highway could be constructed to dissimilar state standards.

[2] Pub. L. 93-87 § 133(a), 87 Stat. 261 (1973).

The section clarifies the fact that state programs do not become federal programs. Federal assistance to state highway construction provides "for a federally assisted State program." Additionally, neither the authorization nor the appropriation of Federal funds nor their availability for expenditure may in any way infringe on the "sovereign rights of the States to determine which projects shall be federally financed". It also follows that the statute recognizes the sovereign right of the States to determine which projects shall not be federally financed.

By its own terms, the NEPA requirement for preparation of an EIS does not apply to state highway construction but is imposed on federal agencies for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Thus, an EIS must be prepared by *federal agencies* for major *federal actions*. That the statute could be applied to the State of Indiana at all distorts its terms beyond recognition; that the statute could have any application at all when there is no federal agency before the Court below is simply incredible. To retain eligibility for federal assistance the states must comply with federal requirements from the earliest planning stages. Yet this very compliance, at a time too early to decide whether federal assistance will be necessary for a project, has been cited as the basis for holding a state project a federal one. Any number of factors can affect a highway department's decision to accept or forego federal assistance on a particular project. The process is a lengthy one, involving years of planning, and the amount of federal funds available to a particular state for highway assistance varies from year to year. It is also true that EIS standards

themselves change. Under existing law, the states have a continuing option to withdraw requests for federal funding in order to exercise effectively their sovereign right to decide which projects shall be federally assisted. While it is true that the federal government is not free to grant federal funds to states whose procedures do not accord with statutory and regulatory guidelines, the inescapable principle to which the courts have occasionally lost sight is that the states are constitutionally free to operate their own highway systems, *State of Nebraska v. Tiemann*, 510 F. 2d 446 (8th Cir. 1975), which includes the right to decline federal assistance and build a state highway with state funds.

This Court should decide whether responsible state officials may exercise their judgment that the requirements of the federal-aid highway program, when judged against essentially local interests and priorities, make federal assistance no longer desirable, and that federal aid should be relinquished and the road constructed by the state, exercising sovereign state powers using state generated resources.

CONCLUSION

For all the reasons set forth above, the State of South Carolina respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the 7th Circuit, entered in these proceedings on the 16th day of February, 1977, to resolve a serious issue of the impairment of the sovereign powers of the State and an issue of federalism that is of grave importance to the State.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

MARVIN C. JONES
Assistant Attorney General

F. KIMBALL JOYNER, JR.
Assistant Attorney General
P. O. Box 191, Room 306-A
Columbia, South Carolina 29202.

Supreme Court, U. S.
FILED
JUN 15 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976
No. 76-1609

STATE OF INDIANA,

Petitioner

v.

SCOTTSDALE MALL,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AS AMICUS CURIAE IN SUPPORT OF INDIANA'S PETITION

ROBERT W. CUNLIFFE
Deputy Attorney General
ROBERT P. KANE
Attorney General
Attorneys for Commonwealth of Pennsylvania, Amicus Curiae

Department of Justice
Capitol Annex Building
Harrisburg, Pennsylvania 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	2
Question Presented	4
Statement of the Case	5
Reason for Granting the Writ	6
Conclusion	14

TABLE OF CITATIONS

Cases:

Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir.), cert. denied 409 U.S. 1047 (1972)	12
Citizens Civic Association of Door County v. Coleman, 9 ERC 1622 (W.D. WI. 1976)	12
Citizens for Food and Progress, Inc. v. Musgrov, 397 F. Supp. 397 (M.D. GA. 1975)	12
Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971)	6, 7, 12
Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926)	11
Missippi & R. River Boom Co. v. Patterson, 98 U.S. 403, 406 (1879)	2
Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972)	8
National League of Cities v. Usery, U.S. , 96 S.Ct. 2465 (1976)	11

Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) .. 12
Rover v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. VA.), aff'd per curiam, 481 F.2d 1280 (4th Cir. 1973) 9
State of Georgia v. City of Chattanooga, 264 U.S. 472 (1924) 2

STATUTES AND REGULATIONS:

23 C.F.R. §771.5(e) 12
40 C.F.R. §1500.6(C) 9
23 U.S.C. §101 7
23 U.S.C. §103 7
23 U.S.C. §105 7
23 U.S.C. §106(a) 8
23 U.S.C. §145 .....3, 8, 10
42 U.S.C. §4321 6
42 U.S.C. §4332 ..... 9, 10
42 U.S.C. §4332(2) (D) 7, 13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1609

STATE OF INDIANA,

Petitioner

v.

SCOTTSDALE MALL,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AS AMICUS CURIAE IN SUPPORT OF INDIANA'S PETITION

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the Commonwealth of Pennsylvania in support of the petition of the State of Indiana to obtain a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 16, 1977.

INTEREST OF THE AMICUS CURIAE

The Commonwealth of Pennsylvania is a sovereign state of the United States with a substantial interest in supporting Indiana's petition for a writ of certiorari in this matter. Pennsylvania is affected by this action because the issues involved bear directly on its right as a State to protect and exercise its sovereign powers. The Court of Appeals held that compliance with federal environmental statutes was necessary in connection with a state highway project even though the state had withdrawn the highway project from federal funding consideration and had returned to the Federal Government all monies it had previously received in connection with the project. Pennsylvania believes that the decision of the Court of Appeals seriously and unduly restricts the well-established right of the States to exercise their sovereign right of eminent domain.

Irrespective of the existence of any Federal-aid highway program, it is clear that the independent States enjoy the right of eminent domain as an element of their sovereignty. *Missippi & R. River Boom Co. v. Patterson,* 98 U.S. 403, 406 (1879). Indeed, the taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be *essential* to the life of the State and it cannot be surrendered. *State of Georgia v. City of Chattanooga,* 264 U.S. 472, 480 (1924).

Congress, through 23 U.S.C. §145, has reserved to each State the right ultimately to determine which projects shall be federally funded. This section insures that the Federal-Aid Highway Act will operate to provide Federal assistance to State projects.

The sovereign right of a State to condemn property and construct thereon public roads is not limited in time. A State may choose to program a highway in such a manner as to keep open its option to finance the project with Federal funds. However, a State may also choose to reject or refuse to accept Federal assistance for the project. For these reasons it is clear that a State cannot be barred by the failure of Federal officials to conform to the requirement of Federal law regarding qualification for Federal assistance to State projects. This is because the State has a continuing option to forego Federal assistance to any given State project and proceed using State funds only. Admittedly, in order to qualify for Federal assistance the State project must qualify under applicable Federal statutory law including the appropriate sections of NEPA. However, the remedy for noncompliance with these statutes is a withdrawal of the Federal assistance, and not an injunction against the State which in the exercise of its sovereignty may choose to continue to construct the project with State funds.

The decision of the Court of Appeals is therefore of special concern to Pennsylvania. It is an unwarranted intrusion into the sovereign rights of the States to determine which highway projects are to be federally funded, and results in the suspension of the State's sovereign power of eminent domain.

QUESTION PRESENTED

Must a State comply with the NEPA requirement of filing an environmental impact statement prior to completion of a highway project which had initially been programmed for Federal aid, if the State withdraws its request for Federal funding and returns the Federal money, prior to the submission of plans, specifications and estimates to the Secretary of Transportation?

STATEMENT OF THE CASE

The State of Indiana has presented a fully detailed statement of the case in its Petition. The Commonwealth of Pennsylvania adopts Indiana's statement of the case.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals presents important questions concerning statutory construction and federalism regarding the relationship between the National Environmental Protection Act and the Federal-aid highway program for state highway construction. The decision of the Court of Appeals is, in effect, an unempowered usurpation of the sovereign powers inherent in the States and as such cannot be countenanced. This Court has not yet considered these questions and the impacts resultantly generated.

The National Environmental Protection Act (NEPA), 42 U.S.C. §4321, et seq. requires that for any "major federal actions significantly affecting the quality of the human environment" the responsible Federal official must prepare a detailed statement of the effect of such action on the environment and of the alternatives available. It cannot be too strongly stated that NEPA does not and cannot apply directly to the States. The Fourth Circuit Court of Appeals has succinctly stated the rule:

> "The short answer . . . is that . . . NEPA . . . impose(s) no duties on the states and operates(s) only upon the federal agencies. . .
>
> "Appellants baldly attempt to stretch rights, protected *by law against infringement by federal agencies only*, to cover the states and their officers in disregard of the plainly limited character of the

> legislation." (Emphasis added.) *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971).

While 42 U.S.C. §4332(2)(D) as amended in 1975 provides that in enumerated circumstances the fact that the detailed statement required under subparagraph C had been prepared by a State agency would not render the statement legally insufficient, this section expressly does not relieve the Federal official of his responsibility for the entire statement. This section is merely reflective of the cooperation between State and Federal agencies in the use of Federal funds.

Pursuant to NEPA, the Federal Highway Aid Program, 23 U.S.C. §101 et seq. requires that a State highway agency designing a highway project eligible for Federal funds complete an environmental statement prior to the selection of a particular location. Therefore, a State highway agency may only preserve its eligibility for Federal highway aid by complying with each of the three phases of the Federal Highway Act. Each stage must be successfully completed before a State can timely request Federal money from the Federal Highway Administration.

During the first phase of the application process pursuant to 23 U.S.C. §103 the State designates a proposed highway project as falling into one of several highway systems. Thereafter, pursuant to 23 U.S.C. §105 a State may program a project for Federal funds. The third step of the process in a State's application for funding occurs when the State agency submits plans, specifications and estimates for approval by the Secretary of Transportation

pursuant to 23 U.S.C. §106(a). Approval of the plan specifications and estimates by the Secretary of Transportation is deemed a contractual obligation of the Federal Government for the payment of its proportional contribution. See *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2 Cir. 1972). Congress, at 23 U.S.C. §145 has specifically reserved to each State the right to determine which of its projects shall be federally funded.

This brief review of the governing statutes indicates that NEPA does not apply directly to the States and that under the Federal Aid Highway Program, Congress has specifically left to the States the power to choose which of their roads will be federally funded.

It is contended here that the programming of a highway for possible Federal funding by a State, the attendant compliance with the applicable Federal statutes and the rules from the Federal Highway Administration (FHWA) at the various stages do nothing more than preserve the State option to seek the Federal funds. If that State at some point fails to comply, it has thereby lost the opportunity for Federal funding of the project. Therefore, in order to maintain its option of utilizing Federal funds on particular projects, the statutes must be complied with. However, none of this binds the State to accept the Federal funds. A State may choose to withdraw or to deprogram a project from Federal funding, at any time, and not be bound by NEPA. Pensylvania joins in the State of Indiana's contention that there is no indispensable Federal involvement in the construction of primary highways, Moreover, regarding the Federal-aid primary highway system, the only major Federal action involved is the financing of the highway in part with Federal funds and not the construction of the highway. Therefore, if at any time a State withdraws a project from Federal financing there can be no major Federal action since there is no control exercised over the project by the Federal Government. That the important factor in determining whether an action is a "major federal action" under NEPA is the extent of federal control over the action is supported by both case law and the Council on Environmental Quality (CEQ) guidelines. See, *Rover v. Richmond Metropolitan Authority*, 359 F. Supp. 611 (E. D. Va.), *aff'd. per curiam*, 481 F.2d 1280 (4th Cir. 1973). CEQ is the agency responsible for assisting other agencies in complying with NEPA and part of its guidelines reads as follows:

> "The words 'major' and 'significantly' are intended to imply thresholds of importance and impact that must be met before a statement is required. The action causing the impact must also be one where there is *sufficient Federal control* and responsibility to constitute 'Federal action' in contrast to cases where such *Federal control* and responsibility are not present. . . ." (Emphasis added.) 40 C.F.R. §1500.-6(C)

The Court of Appeals in the instant case felt compelled to dismiss the above argument because of the strong admonition of Congress contained in NEPA as follows:

> "The Congress authorizes and directs that to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be inter-

preted and administered in accordance with the policies set forth in [NEPA]. . . ." 42 U.S.C. §4332.

The Court of Appeals mistakenly concluded that this expression of congressional will requires that at a point in the ongoing Federal-State relationship under the Federal Aid Highway Act the requirements of NEPA must be met. Again, the Court of Appeals failed to recognize that NEPA, and hence the above-cited section, simply does not apply directly to the States.

The admonition contained in §4332 does not mandate that at a point in the ongoing Federal-State relationship under the Federal Aid Highway Act the requirements of NEPA must be met if and when a highway project is totally withdrawn from Federal funding. The Court of Appeals refused to consider the action of withdrawing the project from the Federal funding a crucial factor, and concluded that the preliminary Federal-State dealings and Indiana's compliance with the applicable Federal statutes and regulations constituted a major Federal action, because of this strong admonition of Congress. This refusal by the Court of Appeals has resulted in the suspension of the sovereign powers of the State of Indiana and further violates the expressed policy of Congress that is embodied at 23 U.S.C. §145, which specifically reserves to each State the right to determine which of its projects shall be federally funded. When the Court of Appeals reinstated the injunction prohibiting the State of Indiana from proceeding further with the highway project rather than enjoining the use of Federal funding for the project, the Court then made an unwarranted incursion into the sovereign powers of the State and further created a series of anomalous situations.

Here then, the sovereign power of a State to exercise eminent domain, a power vital to the very existence of the State, and a power which may not be waived, has not only been curtailed but also destroyed under color of a statute which does not even apply directly to the State and, in fact, may not be made to do so, *National League of Cities v. Usery*, —— U.S. ——, 96 S. Ct. 2465 (1976). While that case reviewed the power of Congress to enact statutes, the same reasoning would apply to this case where a Court within the Federal system has interpreted a statute to render a similar result. In *Usery*, it is plainly seen that this Court properly recognizes the integrity of the States and their ability to function effectively within the Federal system of our Nation. In citing Chief Justice Chase, this Court recognized that the structure of the Constitution presupposes an indestructible Union composed of indestructible States. Further this Court recognized that neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926).

It is clear that the Court of Appeals in ordering the injunction in the present case has not only curtailed the sovereign power of the State of Indiana but has also destroyed the State's ability to exercise eminent domain for that particular project. This is exactly what this Court has held that Congress may not do and therefore a Federal District Court in interpreting a Congressional enactment likewise may not do.

It is clear that the only proper remedy in a situation where the use of Federal funds is about to be made and the applicable Federal statutes have not been complied with is an injunction prohibiting the use of the Federal

funds for that particular project; and not an injunction prohibiting the State from any further work with its own funds upon the project. In *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) the Court of Appeals for the Fourth Circuit, recognizing that nothing had been done to irretrievably characterize the construction of a penal reception and medical center itself as a Federal project, declined to enjoin the State defendants from proceeding with the construction. *See also, Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973); *Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537 (7th Cir.), cert. denied, 409 U. S. 1047 (1972); *Citizens for Food and Progress, Inc. v. Musgrov*, 397 F. Supp. 397 (M.D. GA. 1975); *Citizens Civic Association of Door County v. Coleman*, 9 ERC 1622 (W.D. WI. 1976).

Finally, it is appropriate to point out to this Court other anomalies created by the opinion of the Court of Appeals in the instant case. The Court of Appeals has enjoined any work on the bypass until a proper environmental impact statement has been submitted. However, at this point the United States Department of Transportation has accepted the State of Indiana's withdrawal of the request for funding and would further be required to deny funding as noted by the District Court since the State of Indiana has not obtained an environmental impact statement at the location stage and therefore has failed to comply with 23 C.F.R. §771.5(e). Since the State of Indiana, as noted, above has no authority to prepare or submit an Environmental Impact Statement (EIS) the order of the Court of Appeals requires the United States Department of Transportation to present an EIS for consideration and approval even though it has no interest in

the project at this time and was previously dismissed from this litigation. Therefore the decision of the Court of Appeals results in compelling the Federal Government, which was already dismissed from the proceedings, to expend resources to complete EIS studies on a project that cannot possibly receive Federal funding or in the alternative compelling the State of Indiana to submit, on its own, an EIS for which there is no statutory authority, and, in fact, would violate the clear expression of Congress contained in 42 U.S.C. §4332(2)(D). This situation should not be permitted to exist.

It is important, therefore, that a writ of certiorari be granted in this case. The decision of the Seventh Circuit Court of Appeals in the instant case has resulted in the destruction of the sovereign rights of the State of Indiana and is violative of the expressed policy of Congress. It is important to the Commonwealth of Pennsylvania and to the interest of federalism, that this case be reviewed.

Reason for Granting the Writ

CONCLUSION

For all the reasons set forth above, the Commonwealth of Pennsylvania respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 16th day of February, 1977, to resolve a serious issue of the impairment of the sovereign powers of the State and an issue of federalism that is of grave importance to the States.

Respectfully submitted,

ROBERT W. CUNLIFFE
Deputy Attorney General
ROBERT P. KANE
Attorney General
Attorneys for Commonwealth of Pensylvania, Amicus Curiae

Supreme Court, U. S.
FILED
DEC 1 1977
MICHAEL RODAK, JR. CLERK

No. 76-1609

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF INDIANA, PETITIONER

v.

SCOTTSDALE MALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

EDMUND B. CLARK,
CHARLES E. BIBLOWIT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1609

STATE OF INDIANA, PETITIONER

v.

SCOTTSDALE MALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of October 3, 1977, inviting the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 549 F. 2d 484. The opinion of the district court (Pet. App. A-17 to A-31) is reported at 418 F. Supp. 296.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1977 (Pet. App. A-13). The petition for a writ of certiorari was filed on May 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a State which has programmed a highway project for federal assistance, received federal funds for preliminary engineering, and passed through several stages of federal review and approval may avoid the requirements of the National Environmental Policy Act by withdrawing its request for federal aid and transferring to other eligible projects the federal funds it has received.

STATEMENT

This case concerns the effort of the State of Indiana to construct a highway bypassing the South Bend-Elkhart metropolitan area without satisfying the environmental impact statement (EIS) requirement of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 853, 42 U.S.C. 4332. The western leg of the bypass was constructed as a Federal-aid highway and completed in 1967, prior to the 1970 effective date of NEPA. The eastern leg of the bypass, not yet constructed, has been divided into three segments for planning purposes. Respondent, an Ohio partnership which owns a shopping center that would be bisected by the first segment, brought this action to enjoin construction on the ground, *inter alia*, of failure to comply with NEPA (Pet. App. A-2 to A-4).

The unconstructed segments have been planned and processed as a Federal-aid highway. They have undergone several stages of federal review. They received federal program approval pursuant to 23 U.S.C. 105 and the applicable regulations of the United States Department of Transportation (DOT); location and design hearings were conducted pursuant to the Federal-Aid Highway Act and the applicable DOT regulations; the design of the project was approved by DOT; and Indiana received $162,000 of federal funds for preliminary engineering studies (Pet. App. A-5).

In 1973, the State requested DOT's authorization to proceed with land acquisition for the first segment. When DOT informed the State that an environmental impact statement was required before further work could proceed, Indiana withdrew its request for federal funding of the first segment. DOT then advised the State that the three segments were considered one project for EIS purposes and that despite the withdrawal of the request for federal assistance for the first segment, an EIS would be required for all three segments in order for Indiana to receive federal funds for any segment (Pet. App. A-5 to A-6).

The State submitted an EIS on the last two segments for federal review. It then submitted a supplemental EIS on the first segment. DOT approved the EIS, as supplemented, on June 1, 1974 (Pet. App. A-6).

Respondent brought this action against the State, the State Highway Commission, and the Secretary of Transportation after Indiana announced its intention to proceed with land acquisition for the first segment. On January 20, 1975, the district court entered a preliminary injunction. Just prior to issuance of the injunction, DOT withdrew its approval of the EIS and required the State to prepare a new EIS for all three remaining segments (Pet. App. A-6). This decision was based on a re-examination of the EIS in which DOT determined that the EIS was procedurally defective because it had not been properly circulated for public comment as required by 42 U.S.C. 4332(2)(C). Indiana then decided to withdraw its request for federal funding for the last two segments as well as the first and to complete construction of the bypass entirely with state funds. This decision, however, did not entail any reduction in the amount of federal money received for Indiana highway projects, since the State by an accounting transfer allocated to other projects the federal funds

it had received for the preliminary engineering studies. The district court dismissed the action against the federal defendants. Subsequently, the district court dissolved the injunction and entered judgment for the State, holding that because of the withdrawal from Federal-aid participation the bypass project was no longer subject to NEPA.

The court of appeals reversed. It found that there had been "federal participation in the programming, location, design, preliminary engineering, and right of way acquisition stages," and hence it had "no difficulty in concluding on the basis of the record before us that the entire by-pass project is a 'major federal action' within the meaning of 42 U.S.C. 4332(C) [sic] and that an EIS is required for the remaining three segments" (Pet. App. A-10).

ARGUMENT

The issue presented in this case is of diminishing significance. The decision involves only this highway project and a handful of others that predate the advent of NEPA and the issuance in 1972 of the Federal Highway Administration's regulations implementing NEPA. The decision thus will not have a significant effect on the administration of either the Federal-Aid Highway Act or NEPA. Review by this Court is therefore unwarranted.

NEPA requires that an EIS be submitted for any "major Federal actions" (42 U.S.C. 4332(2)(C)). Although a Federal-aid highway project of the dimensions involved here is a major federal action when completed (see 23 C.F.R. 771.9(d)), it is not born one. It becomes one only at some point in its passage through progressive levels of federal processing, approval, and funding. See 23 C.F.R. 771.3(c). Such a project goes through stages that include, in chronological order, location approval, design

approval, and plans, specifications and estimates (PS & E) approval. The question decided by the court of appeals here, and presented for review in the Petition for Certiorari (Pet. 2), involves judicial identification of the stage at which the project becomes a major federal action and hence requires an environmental impact statement under NEPA.

For future projects and for almost all current ones, however, this question has been effectively mooted by regulations implementing NEPA that were issued by the Federal Highway Administration in 1972. These regulations (now 23 C.F.R. 771.5(b); see Pet. App. A-7, n. 6) require, in order for a highway construction project to obtain federal funding, that the environmental impact statement be submitted to the Department of Transportation, and approved by it, during the location stage and prior to selection of a particular location. In the present case, the location for the eastern leg of the bypass was selected in 1966 or 1967 (Pet. App. A-3, A-20), well before the enactment of NEPA. As the court of appeals correctly held (Pet. App. A-7, n. 6), the fact that this project predated NEPA—and, of course, the implementing regulations of the Federal Highway Administration—did not exempt it from NEPA's requirement of an environmental impact statement. The court was therefore required to identify the post-location stage at which that requirement attached to this project, and held that it did attach before Indiana decided to withdraw the project from further federal funding. In cases involving future projects and almost all other outstanding ones, however, courts will have to make no such decision, since any project whose location was approved subsequent to issuance of the 1972 regulations must have met the EIS requirement at the location stage if it seeks to qualify for federal funding.

The highway project involved in this case, whose long history predates both NEPA and the Federal Highway Administration regulations, is thus one of a vanishing breed. Since 1972, States that wish to renounce federal funding rather than file an environmental impact statement must do so prior to location approval, a stage when federal involvement is far less advanced than it was with this project. The question may arise whether a project whose federal participation is aborted at that stage is nonetheless a "major Federal action" under NEPA, but that would be a different question from the one presented here, where federal involvement continued long past location approval. Because an early EIS is now required for continued federal funding, there is no need for this Court to review the question whether the court of appeals was correct here in holding that a highway project as long involved with federal participation as this one was constituted a "major Federal action" for the purposes of NEPA.[1]

---

[1]Petitioner asserts (Pet. 10) that "the Court of Appeals has created an impossible situation" because the State has withdrawn its request for federal participation and the Department of Transportation therefore "has no interest in the bypass project," and yet the environmental impact statement which the court of appeals has held to be required is a requirement of federal law and can only be administered by DOT. We see no such problem. Since the court of appeals has held this to be a "major Federal action" under NEPA, the Department of Transportation would apparently be required by that Act (42 U.S.C. 4332(2)(C)) to process and approve an environmental impact statement for the project. In any event, the Department of Transportation will undertake this responsibility if Indiana proceeds with the project.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

EDMUND B. CLARK,
CHARLES E. BIBLOWIT,
Attorneys.

DECEMBER 1977.

DOJ-1977-12